Supreme Court, U.S.
FILED
951026 DEC 26 1995
OFFICE OF THE CLERK
NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

MURRAY & MURRAY CO., L.P.A. PROFIT-SHARING PLAN AND TRUST and DENNIS E. MURRAY, SR., its trustee, et al.

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the COUNTY OF MARICOPA;

Respondent,

v.

PERFORMANCE INDUSTRIES, INC., fka MR. GASKET COMPANY, INC., an Ohio corporation,

Respondent-Real Party in Interest.

On Petition for Writ of Certiorari to the Supreme Court of Arizona

PETITION FOR WRIT OF CERTIORARI

DENNIS E. MURRAY, SR.*
DAVID D. YEAGLEY
Murray & Murray Co., L.P.A
111 East Shoreline Drive
Sandusky, Ohio 44870
(419) 624-3000

H. SULLIVAN BUNCH
SCOTT A. ERICKSON
4041 N. Central Ave.
Phoenix, AZ 85012
(602) 274-1190

Counsel for Petitioner
** Counsel of Record*

December 1995

72 pp

QUESTION PRESENTED

Whether the exercise by an Ohio resident of an Ohio statutory right, standing alone, establishes requisite minimum contacts with the State of Arizona to support an exercise of in personam jurisdiction over petitioner by the Arizona courts consistent with the Due Process Clause of the Fourteenth Amendment.

LIST OF PARTIES

"Petitioner" is, collectively: Murray & Murray Co., L.P.A. Profit-Sharing Plan and Trust and Dennis E. Murray, Sr., its trustee; and Murray & Murray Co., L.P.A. - Dennis Murray Voluntary Account and Dennis E. Murray, Sr., its trustee.

"Respondent" is: Superior Court of the State of Arizona, in and for the County of Maricopa; The Honorable Michael Yarnell, a Judge thereof. The second special action proceeding also involved as Respondent the Superior Court of the State of Arizona, in and for the County of Maricopa; The Honorable Louis A. Araneta, a Judge thereof.

Respondent-Real Party in Interest is fully identified in the caption.

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 3

CONSTITUTIONAL PROVISION INVOLVED 3

STATEMENT OF THE CASE 4

REASON FOR GRANTING THE PETITION 9

I. THE DECISION BELOW VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, BECAUSE MINIMUM CONTACTS NECESSARY FOR THE ARIZONA COURTS TO CONSTITUTIONALLY EXERCISE IN PERSONAM JURISDICTION OVER AN OHIO RESIDENT ARE NOT ESTABLISHED SOLELY BY THE EXERCISE BY THAT OHIO RESIDENT OF AN OHIO STATUTORY RIGHT. 11

CONCLUSION 22

TABLE OF CONTENTS - Continued

APPENDIX 1 1-1

APPENDIX 2 2-1

APPENDIX 3 3-1

APPENDIX 4 4-1

APPENDIX 5 5-1

APPENDIX 6 6-1

APPENDIX 7 7-1

APPENDIX 8 8-1

TABLE OF AUTHORITIES

Page(s)

CASES

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985).....7, 11, 12, 15

Hanson v. Denckla,
357 U.S. 235 (1958).....14

Helicopteros Nacionales de Columbia, S.A. v. Hall,
466 U.S. 408 (1984).....13

Hynson v. Drummond Coal Co., Inc.
601 A.2d 570 (Del. Ch. 1991).....20

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea,
456 U.S. 694 (1982).....17, 18

International Shoe Co. v. Washington,
326 U.S. 310 (1945).....6, 7, 10, 11, 13

Kulko v. Superior Court of California,
436 U.S. 84 (1978).....14

Mullane v. Central Hanover Bank & Trust Co., 339 U.S.
306 (1950).....20

Wilson v. Celestial Greetings, Inc.,
896 S.W. 2d 759 (Mo. Ct. App. 1995).....19

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286 (1980).....14

TABLE OF AUTHORITIES - Continued

STATUTES AND RULES

28 U.S.C. Section 1257(a).....3
Ariz. Rules of Procedure for Special Actions.....7
9 Del. Code § 262.....19
Model Business Corporation Act, § 81 19
Ohio Rev. Code § 1701.85.....4, 5, 21
Revised Model Business Corporation Act, § 13.30 19

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No.

MURRAY & MURRAY CO., L.P.A. PROFIT-SHARING PLAN AND TRUST and DENNIS E. MURRAY, SR., its trustee, et al.

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the COUNTY OF MARICOPA;

Respondent,

v.

PERFORMANCE INDUSTRIES, INC., fka MR. GASKET COMPANY, INC., an Ohio corporation,

Respondent-Real Party in Interest.

On Petition for Writ of Certiorari to the Supreme Court of Arizona

---

PETITION FOR WRIT OF CERTIORARI

Petitioner, Murray & Murray Co., L.P.A Profit-Sharing Plan and Trust, et al., respectfully petitions for a writ of certiorari to review the final decision of the Supreme Court of Arizona, which declined to exercise

discretionary jurisdiction to review the decision of the Court of Appeals of Arizona, which upheld on special action (mandamus) review the decision of the Superior Court of Arizona denying petitioner's Motion to Dismiss for Lack of Personal Jurisdiction.

OPINIONS BELOW

All decisions rendered below by the Arizona state courts below are unreported. The following decisions, rendered below, are reproduced in the Appendix ("App."):

App. 1: September 26, 1995 judgment entry of the Supreme Court of Arizona, denying petition for review of May 9, 1995 decision of Court of Appeals of Arizona.

App. 2: June 20, 1995 decision of the Court of Appeals of Arizona, denying petitioner's motion for reconsideration of May 9, 1995 special action decision.

App. 3: May 9, 1995 decision of the Court of Appeals of Arizona, exercising special action jurisdiction and denying petitioner's request for relief from February 8, 1995 decision of Superior Court of Arizona.

App. 4: February 8, 1995 decision of the Superior Court of Arizona, denying (on remand from Court of Appeals of Arizona) petitioner's Motion to Dismiss for Lack of Personal Jurisdiction.

App. 5: August 24, 1994 decision of the Court of Appeals of Arizona, exercising special action jurisdiction over June 7, 1994 decision of Superior Court of Arizona, and remanding for reconsideration "of Arizona's exercise of personal jurisdiction . . . in light the minimum contacts required. . . ."

App. 6: June 7, 1994 decision of the Superior Court of Arizona, denying petitioner's Motion to Dismiss for Lack of Personal Jurisdiction.

JURISDICTION

The Supreme Court of Arizona denied the petition to review the judgment of the Court of Appeals of Arizona. The entry of the Supreme Court of Arizona denying the petition to review is dated September 26, 1995. (App. 1). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "nor shall

any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

A few uncontroverted facts frame this issue of pure Constitutional dimension.

Petitioner is a resident of the State of Ohio. Respondent/real-party-in-interest Performance Industries, Inc. ("Performance") is an Ohio corporation. Performance presently has its principal place of business in Phoenix, Arizona, although it maintains its status as an Ohio corporation.

Petitioner is a shareholder of Performance. Performance undertook an extraordinary corporate transaction, which triggered petitioner's Ohio statutory dissent and appraisal rights under Ohio Rev. Code Section 1701.85 (Ohio Rev. Code Section 1701.85 is reproduced at App. 7.) Ohio Rev. Code Section 1701.85 is a shareholder protection measure that allows a shareholder to dissent from an extraordinary corporate transaction and receive "fair cash value" for the shares. There is no question that the Ohio dissent and appraisal statute was triggered, nor that Ohio law applies.

Petitioner exercised its Ohio statutory rights under Ohio Rev. Code Section 1701.85, in accordance with the strict procedural requirements of the Ohio statute and the instructions of Performance. Performance subsequently instituted this lawsuit under Ohio Rev. Code Section 1701.85, in Arizona, against petitioner and other dissenting shareholders. Performance's current principal place of business made it strategically advantageous for Performance to sue petitioner in Arizona.

Petitioner would be compelled to defend the lawsuit brought by Performance against it, to protect its rights and interests under the Ohio statute. It is uncontroverted that petitioner does not have minimum contacts with the State of Arizona. App. 8 (affidavit of petitioner, submitted in Superior Court of Arizona in support of Motion to Dismiss for Lack of Personal Jurisdiction). Petitioner's exercise of its Ohio statutory rights is the sole and exclusive premise for the assertion of in personam jurisdiction over petitioner by the Arizona courts.

The Record, reviewed below, confirms that petitioner has consistently and exclusively pursued this Fourteenth Amendment Due Process issue related to the

exercise of in personam jurisdiction over a non-resident. Cf. Rule 14.1(h) (requiring petitioner to establish that Court has jurisdiction to review a federal question on writ of certiorari).

In the court of first instance (the Superior Court of Arizona), petitioner entered a special appearance to contest the Superior Court's jurisdiction over petitioner, by way of petitioner's Motion to Dismiss for Lack of Personal Jurisdiction. Petitioner argued that the exercise of jurisdiction by Arizona courts over petitioner would offend "the due process clause of the 14th Amendment," citing International Shoe Co. v. Washington, 326 U.S. 310 (1945). Petitioner's Motion was supported by an uncontroverted affidavit establishing that petitioner has no contacts with the State of Arizona. App. 8. The Superior Court of Arizona denied petitioner's Motion to Dismiss, App. 6. (June 7, 1994), holding that Arizona courts could assert in personam jurisdiction over petitioner on the basis of implied consent. App. 6-5 - 6-6.

Petitioner pursued interlocutory review of the June 7, 1994 decision of the Superior Court pursuant

to Arizona's special action procedure.[1] The Court of Appeals accepted discretionary special action jurisdiction, and remanded the case to the Superior Court. App. 5 (August 24, 1994). The Court of Appeal's special action mandate confirms the Constitutional dimension of this issue:

> [remand] for reconsideration of Arizona's exercise of personal jurisdiction over petitioners in light of the "minimum contacts" required by Shaffer v. Heitner, 433 U.S. 186 (1977) and Batton v. Tennessee Farmers Mutual Ins. Co., 153 Ariz. 268, 736 P.2d 2 (1987).

App. 5-2.

On remand to the Superior Court from the Court of Appeal's special action mandate, petitioner fully briefed the Due Process issue of in personam jurisdiction, arguing that minimum contacts are required under, inter alia, Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), and International Shoe Co. v. Washington, 326

---

[1] The special action is in the nature of an extraordinary writ, e.g., mandamus. See Ariz. Rules of Procedure for Special Actions.

U.S. 310 (1945). The Superior Court, however, again concluded that Arizona courts could exercise jurisdiction over petitioner under the notion of implied consent of petitioner to an Arizona forum. App. 4-5 - 4-8 (February 8, 1995).

Following the February 8, 1995 decision of the Superior Court, petitioner once again petitioned for, and the Court of Appeals again accepted, special action jurisdiction. The Court of Appeals denied relief to petitioner, adopting the February 8, 1995 opinion of the Superior Court. App. 3-2 (May 9, 1995). Petitioner's motion for reconsideration was denied. App. 2 (June 20, 1995).

The Supreme Court of Arizona declined to exercise discretionary review. App. 1 (September 26, 1995). Petitioner framed the federal Constitutional issue: "[t]he assertion of personal jurisdiction over [petitioner] violates the right to due process guaranteed . . . by the Fourteenth Amendment to the United States Constitution. . . ." Petition for Review filed in Arizona Supreme Court, at p. 7.

Accordingly, this Fourteenth Amendment Due Process issue has been continuously and

exclusively pursued through all levels of the Arizona state courts. Because this Fourteenth Amendment issue has wound its way through the state courts of Arizona, this petition is the first (and last) opportunity for a federal court to resolve the burning issue of federal Constitutional law.[2]

REASON FOR GRANTING THE PETITION

This case presents a jurisdictional issue of first impression. This case confronts hollowed Due Process analysis of in personam jurisdiction, in the 1990's context of a statutory shareholder dissent and appraisal proceeding. The exercise by an Ohio resident of an Ohio statutory right involving an Ohio corporation cannot, standing alone, establish requisite minimum contacts with the state of Arizona sufficient for a

---

[2] The decisions below reflect the difficulties encountered by the Arizona courts in coming to terms with this Fourteenth Amendment issue. The Superior Court identified existing judicial hostility to the "implied consent" theory that was nevertheless applied. The Court of Appeals twice accepted this issue for special action (mandamus) review. The first Court of Appeals panel ostensibly rejected the implied consent theory, and remanded to the Superior Court with a mandate to conduct the requisite minimum contacts analysis. Notwithstanding this mandate, the Superior Court on remand, and the second special action panel of the Court of Appeals, again applied the implied consent theory, finding that petitioner consented to Arizona jurisdiction. Thus, the second Court of Appeals panel based its decision on a theory that the first Court of Appeals panel ostensibly rejected.

Constitutional exercise of in personam jurisdiction by Arizona's courts over the Ohio resident, in a lawsuit brought in Arizona against the Ohio resident arising out of the exercise of the statutory right. The decision below expands Arizona's in personam jurisdiction far beyond the Due Process boundaries reflected in the traditional minimum contacts test of International Shoe[3] and its progeny.

Petitioner respectfully submits that the decision below should be reversed or vacated, because Arizona courts cannot exercise jurisdiction over petitioner consistent with Due Process. In the alternative, petitioner respectfully urges this Court to remand to the Superior Court of Arizona for consideration of required minimum contacts.

---

3 International Shoe Co. v. Washington, 326 U.S. 310 (1945).

I. THE DECISION BELOW VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, BECAUSE MINIMUM CONTACTS NECESSARY FOR THE ARIZONA COURTS TO CONSTITUTIONALLY EXERCISE IN PERSONAM JURISDICTION OVER AN OHIO RESIDENT ARE NOT ESTABLISHED SOLELY BY THE EXERCISE BY THAT OHIO RESIDENT OF AN OHIO STATUTORY RIGHT.

The Constitutional touchstone for the exercise of in personam jurisdiction over a non-resident is whether the defendant has established meaningful "minimum contacts" with the forum state sufficient to protect the liberty interest in the Due Process Clause. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72, 474 (1985). The concept of minimum contacts is tied-into the Due Process consideration of "fair play and substantial justice." International Shoe, 326 U.S. at 320. Fair play and substantial justice requires that a defendant be able to predict, with some degree of assurance, whether his own purposeful conduct will render him amenable to suit in a particular forum. Burger King, 471 U.S. at 472. Due process is not satisfied unless the defendant itself **purposefully** creates contacts that

establish a **substantial connection** with the forum state. Burger King, 471 U.S. at 474-75 (citations omitted). Minimum contacts are present if a defendant voluntarily and purposefully "avails itself of the privilege of conducting activities within the forum, thus invoking the benefits and protections of [the forum's] laws." Burger King, 471 U.S. at 475.

The Arizona courts cannot, as a matter of law, exercise in personam jurisdiction over petitioner. The exercise of in personam jurisdiction over petitioner is exclusively grounded upon petitioner's compelled exercise of an Ohio statutory right. The exercise of an Ohio statutory right by an Ohio resident with no contacts or ties with or to Arizona cannot, standing alone, establish requisite minimum contacts with Arizona.

It is "essential" that defendant (here, petitioner) invoke the "benefits and protections" of the forum's laws. Burger King, 471 U.S. at 475. **Petitioner, however, exercised an OHIO STATUTORY RIGHT, not any benefit or protection of Arizona law**. Because Petitioner has not availed itself of any Arizona benefit or protection, the assertion of personal jurisdiction over petitioner by the Arizona courts is unconstitutional.

Requisite minimum contacts cannot, moreover, be engineered or created by the plaintiff (Performance). Rather, the defendant (petitioner) itself must voluntarily and purposefully establish minimum contacts with the forum. Burger King, 471 U.S. at 474-75 (citations omitted). The requirement that defendant itself establish meaningful contacts with the forum precludes the establishment of contacts based upon the "unilateral activity of another party or third person." Burger King, 471 U.S. at 475 (quoting Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 417 (1984)).

The exercise of in personam jurisdiction by Arizona courts over petitioner violates this central principle. Performance -- the plaintiff -- unilaterally and inceptively selected an Arizona forum.[4] The holding below offends Due Process, because in personam jurisdiction is premised on the unilateral machinations of the plaintiff, rather than the purposeful activities of the defendant. Being forced to defend a lawsuit in whatever distant forum the corporate plaintiff unilaterally chooses is, by definition, outside the realm of "fair play and

---

[4] To illustrate this point, Performance unilaterally relocated its principal offices to Arizona after petitioner purchased its Performance stock. App. 8 (affidavit of petitioner).

substantial justice." See International Shoe, 326 U.S. at 320.[5]

This Court has repeatedly held that minimum contacts are lacking where, as here, the defendant itself did not establish purposeful contacts with the forum state. See, e.g., World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (unilateral action of consumer driving vehicle into forum state did not establish requisite minimum contacts with non-resident); Kulko v. Superior Court of California, 436 U.S. 84, 93-94 (1978) (California could not assert in personam jurisdiction over New York resident defendant based on the unilateral activity of plaintiff in moving to California; defendant did not "'purposefully avail himself' of the 'benefits and protections' of California's laws." (citation omitted)); Hanson v. Denckla, 357 U.S. 235, 253-54 (1958) (unilateral activity of trust settlor in moving to Florida was not sufficient for Florida to exercise in personam jurisdiction over Delaware trustee).

---

[5] Under the holding below, petitioner would be subject to the jurisdiction of any (and all) of the fifty States, depending exclusively on where Performance unilaterally decided to relocate its principal offices. The degree of predictability flowing from the defendant's purposeful activity, which is required by Due Process, would be totally lost.

It is of no jurisdictional significance that petitioner complied with the strict statutory prerequisites and Performance's own instructions relative to perfecting its Ohio statutory rights.[6] Petitioner's actions were, in this respect, necessary, mandated prerequisites to the effective preservation of its Ohio statutory rights, and were therefore not voluntary and purposeful actions invoking the benefits and protections of Arizona law. See Burger King, supra. This type of metaphysical "effect" in the forum state has never been sufficient to establish meaningful minimum contacts.[7]

The Arizona courts cannot exercise in personam jurisdiction over petitioner, consistent with the Constitutional touchstone of minimum contacts. The Arizona courts below, casting aside the Due Process constraints of the minimum contacts test, rationalized the assertion of jurisdiction over petitioner under a misguided

---

[6] For instance, in order to preserve its rights under the strict procedural prerequisites, petitioner was required to send dissent and appraisal papers to Performance's Arizona headquarters -- the headquarters unilaterally selected by Performance.

[7] By way of contrast, this Court held in Burger King that the federal district court for the Southern District of Florida could Constitutionally exercise in personam jurisdiction over Rudzewicz, a Michigan resident, based upon the fact that Rudzewicz "entered into a carefully structured 20 year relationship that envisioned continuing and wide-reaching contacts with Burger King in Florida." 471 U.S. at 480.

notion of "implied consent" by petitioner to an Arizona forum arising from petitioner's exercise of Ohio statutory rights.[8] The Arizona courts thereby expanded the reach of in personam jurisdiction far beyond Due Process limitations.

This notion of "implied consent" is tied to the false premise that petitioner voluntarily elected to exercise its Ohio statutory rights.[9] "Consent" to jurisdiction that passes Due Process scrutiny cannot be extrapolated from the lawful exercise of a statutory right conferred by a non-forum state. Petitioner did not "choose" or "elect" to exercise its rights under Ohio Rev. Code Section 1701.85. Petitioner was, rather, compelled by Performance's own actions to avail itself of the statutory protections to which it was entitled.

Petitioner's only "alternatives" under the fatally-flawed implied consent theory were: (1) "choose" not to exercise its Ohio statutory rights, and thereby forfeit the protections the statute was expressly designed to provide; or (2) "choose" to exercise Ohio statutory

---

[8] See, e.g., App. 4-8 (petitioner "consented to jurisdiction, even if unknowingly, by exercising [statutory rights]. . . ."); App. 6-6 ("implied consent by any shareholder exercising appraisal rights under the Ohio statute. . . .").

rights, and thereby forfeit Due Process and be forced to defend a lawsuit in a faraway jurisdiction of Performance's unilateral choosing. The implied consent theory embraced below is inherently flawed because it creates an involuntary, unconstitutional "Catch-22." A Constitutional exercise of in personam jurisdiction over a non-resident cannot be grounded on a theory that requires the defendant -- in either alternative -- to forfeit important rights and protections. A forum cannot acquire in personam jurisdiction over a non-resident in the absence and outside the bounds of required minimum contacts, solely as a consequence of that non-resident's exercise of a statutory right that is not one conferred by the forum state's laws.

Performance has claimed that jurisdiction may be asserted over petitioner based on the notion of implied, under Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, 456 U.S. 694 (1982). The Insurance Corp. of Ireland case, however, actually highlights the Due Process roadblock to implying consent to jurisdiction in Arizona premised exclusively on the exercise by an Ohio resident of an Ohio statutory

---

[9] See, e.g., App. 4-6 - 4-7 (petitioner "elected to exercise"

right. In Insurance Corp. of Ireland, this Court held that a district court could assert personal jurisdiction over a non-resident defendant as a **sanction** for the defendant's contumacious refusal to comply with discovery orders. 456 U.S. at 695. Petitioner, to the contrary, has acted completely within its rights, through exercising an Ohio statutory right. Petitioner's Due Process rights cannot be denied as a sanction. No waiver or forfeiture of Constitutional rights can follow from the lawful exercise of a statutory right.[10]

Nor is petitioner amenable to Arizona jurisdiction by analogy to a voluntary contractual forum selection clause, an argument that Performance advanced and which received a favorable reception below. See App. 4-6 - 4-8.

Exercising a statutory right is not the functional equivalent of a voluntary contractual agreement. Petitioner's exercise of its statutory rights was compelled. Exercise of a statutory right carries with it the full panoply of Due Process protections, which cannot be

---

statutory rights).

[10] Furthermore, this Court did not eradicate in Insurance Corp. of Ireland the Due Process safeguards inherent in the minimum contacts test. This Court's holding in Burger King unequivocally

waived or otherwise taken away as a consequence of the lawful exercise of the statutory right.

Performance argued below that the Ohio dissent and appraisal statute "required" Performance to sue petitioner in Arizona. The misguided conception of what the Ohio statute "required" of Performance does not supersede the minimum contacts that are necessary for Arizona to assert jurisdiction over petitioner consistent with Due Process.

In the first place, the Ohio dissent and appraisal statute specifies that an action under the statute be brought in the "court of common pleas," a clear identification of Ohio's trial courts of general jurisdiction. See App. 7. The Model Business Corporation Act ("MBCA"), Revised Model Business Corporation Act ("RMBCA"), and Delaware law all specify that a statutory dissent and appraisal proceeding be maintained in the state of incorporation. See MBCA, § 81; RMBCA, § 13.30; 9 Del. Code § 262. Just recently, a Missouri state appellate court upheld a decision that a Delaware dissent and appraisal proceeding must proceed in Delaware state

---

requires that a State's exercise of in personam jurisdiction over a non-resident defendant be premised on minimum contacts.

court. Wilson v. Celestial Greetings, Inc., 896 S.W. 2d 759, 762 (Mo. Ct. App. 1995).[11]

Even if the Ohio dissent and appraisal statute suffers from ambiguity concerning where a dissent and appraisal proceeding may be brought, that ambiguity must be resolved in such a way as to uphold the Constitutionality of the statute. The Ohio dissent and appraisal statute, accordingly, must be construed to require an appraisal proceeding to be brought in Ohio, because Performance is an Ohio corporation.[12] The Ohio dissent and appraisal statute cannot be construed to require that a shareholder forfeit Due Process protections in order to avail itself of statutory protections.

The Ohio dissent and appraisal statute and Due Process are reconciled by the principle that the state of incorporation provides requisite minimum contacts with shareholders. See, e.g., Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (establishing right of state court under whose law trust is created and established to determine interests of all claimants --

---

[11] Furthermore, Ohio has a compelling interest in adjudicating a proceeding involving an Ohio statute that applies to an Ohio corporation.

resident and non-resident). See also Hynson v. Drummond Coal Co., Inc., 601 A.2d 570, 579 (Del. Ch. 1991) (buying stock of Delaware corporation establishes nexus with Delaware sufficient for in personam jurisdiction of Delaware court in matters of internal corporate governance). There is a fundamental distinction between the state of incorporation (and whose laws the corporation is thereby governed by), and the state(s) where the corporation unilaterally decides at any point in time to relocate its principal office. The nexus between a shareholder and the state of incorporation establishes requisite minimum contacts, without resorting to an indefensible theory of jurisdiction such as implied consent. Performance was required to bring the statutory dissent and appraisal proceeding under Ohio Rev. Code Section 1701.85 in Ohio common pleas court.

In the final analysis, Arizona courts have exercised in personam jurisdiction over petitioner in the absence of minimum contacts, premised exclusively on the exercise by petitioner of an Ohio statutory right. Because Arizona has expanded its in personam

---

[12] An Ohio statutory dissent and appraisal proceeding is required to be brought in Ohio because Performance is an Ohio corporation, not because petitioner happens to be an Ohio resident.

jurisdiction over non-residents far beyond the Constitutional bounds of minimum contacts, this case cries out for relief.

CONCLUSION

Petitioner respectfully submits that the Petition for Writ of Certiorari should be granted, and the judgment below reversed. In the alternative, petitioner respectfully urges this Court to grant this Petition, and remand this case to the Superior Court for resolution of petitioner's minimum contacts with the State of Arizona.

Respectfully submitted.

DENNIS E. MURRAY, SR.*
DAVID D. YEAGLEY
Murray & Murray Co., L.P.A
111 East Shoreline Drive
Sandusky, Ohio 44870
Telephone: (419) 624-3000

H. SULLIVAN BUNCH
SCOTT A. ERICKSON
Bonnett, Fairbourn,
Friedman, Heinton, Miner
& Fry, P.C.
4041 N. Central Ave.
Ste. 1100
Phoenix, AZ 85012

Counsel for Petitioner
* Counsel of Record

December 1995

APPENDIX 1

Supreme Court
State of Arizona

Noel K. Dessaint
Clerk of Court

Kathleen E. Kempley
Chief Deputy Clerk

402 Arizona State Courts Building
1501 West Washington
Phoenix, Arizona 85007-3329

TELEPHONE: (602) 542-9396

September 29, 1995

RE: MURRAY & MURRAY CO L.P.A. PROFIT-SHARING PLAN & TRUST et al vs. HON. MICHAEL YARNELL - MAR CO SUP CT/PERFORMANCE INDUSTRIES

Supreme Court No. CV-95-0336-PR
Court of Appeals No. 1 CA-SA 95-0104
Maricopa County No. CV 94-00235

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 26, 1995, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Justice Corcoran did not participate in the determination of this matter.

Record returned to Court of Appeals, Division One, Phoenix, this 29th day of September, 1995.

Noel K. Dessaint, Clerk

TO:
Dennis E. Murray, Sr., Esq. And David D. Yeagley, Esq., Murray & Murray Co., L. P. A.
H. Sullivan Bunch, Esq. And Scott A. Erickson, Esq., Bonnett,
Fairbourn, Friedman, Hienton, Miner & Fry, P.C.
John T. Moshiere, Esq., Joseph A. Kendhammer, Esq. And Gregory P. Gillis, Esq., Ridenour, Swenson, Cleere & Evans, P.C.
Glen D. Clark, Clerk, Court of Appeals, Division One, Phoenix
Lexis-Nexis
West Publishing Company

APPENDIX 2

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MURRAY & MURRAY COMPANY, L.P.A. PROFIT SHARING PLAN AND TRUST and DENNIS E. MURRAY, SR., its trustee; and MURRAY & MURRAY COMPANY, L.P.A. - DENNIS MURRAY VOLUNTARY ACCOUNT and DENNIS E. MURRAY, SR., its trustee,	) 1 CA-SA 94-0214) DEPARTMENT D) Maricopa County) Superior Court) No. CV 94-00235
Petitioners,	
v.	
SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa, THE HONORABLE MICHAEL YARNELL, a Judge thereof,	
Respondent Judge,	ORDER
PERFORMANCE INDUSTRIES, INC., fka MR. GASKET COMPANY, INC., an Ohio Corporation,	
Real Parties in Interest.	

The Court has received Petitioners' Motion for Reconsideration and the response thereto; after consideration,

IT IS ORDERED denying the Motion for Reconsideration.

DATED this 20th day of June, 1995.

/s/ E.G. Noyes, Jr.
E.G. Noyes, Jr., Presiding Judge

1 CA-SA 94-0214

June 20, 1995

MARICOPA COUNTY
Superior Court
CV 94-00235

A true copy of the foregoing order was mailed June 20, 1995 to:

Mr. H. Sullivan Bunch
BONNETT, FAIRBOURN, FRIEDMAN, HIENTON, MINER & FRY, P.C.
Suite 1100
4041 North Central Avenue
Phoenix, AZ 85012-3311
And

Mr. Scott A. Erickson
BONNETT, FAIRBOURN, FRIEDMAN, HIENTON, MINER & FRY, P.C.
Suite 1100
4041 North Central Avenue
Phoenix, AZ 85012-3311
Attorneys for Petitioners

Mr. Dennis E. Murray, Sr.
MURRAY & MURRAY CO., L.P.A.
111 East Shoreline Drive
PO Box 19
Sandusky, Ohio 44871-0019
And

Mr. David D. Yeagley
MURRAY & MURRAY CO., L.P.A.
111 East Shoreline Drive
PO Box 19
Sandusky, Ohio 44871-0019
Co Counsel for Petitioners

Mr. John T. Moshier
RIDENOUR, SWENSON, CLEERE &
EVANS, P.C.
Suite 900
302 North First Avenue
Phoenix, AZ 85003
Attorneys for Real Party in Interest

1 CA-SA 95-0104

Honorable Michael A. Yarnell, Judge
MARICOPA COUNTY SUPERIOR COURT
Central Court Building
201 West Jefferson Street
Phoenix, AZ 85003-2205

Glen D. Clark, Clerk
By
/s/ Leeann Williams
Deputy Clerk

APPENDIX 3

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MURRAY & MURRAY COMPANY, L.P.A. PROFIT SHARING PLAN AND TRUST and DENNIS E. MURRAY, SR., its trustee; and MURRAY & MURRAY COMPANY, L.P.A. - DENNIS MURRAY VOLUNTARY ACCOUNT and DENNIS E. MURRAY, SR., its trustee,	) 1 CA-SA 94-0214) DEPARTMENT D) Maricopa County) Superior Court) No. CV 94-00235
Petitioners,	)
v.	)
SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa, THE HONORABLE MICHAEL YARNELL, a Judge thereof,	)
Respondent Judge,	) ORDER
PERFORMANCE INDUSTRIES, INC., fka MR. GASKET COMPANY, INC., an Ohio Corporation,	)
Real Parties in Interest.	)

This special action came on regularly for conference this 9th day of May, 1995, before Presiding Judge E.G. Noyes, Jr. and Judges Edward C. Voss and

Sarah D. Grant participating. The matter was taken under advisement. After consideration,

IT IS ORDERED that the Court of Appeals, in the exercise of its discretion, accepts jurisdiction in this special action, and denies relief for the reasons and authorities provided in Judge Araneta's minute entry of February 8, 1995.

DATED this 9th day of May, 1995.

/s/ E.G. Noyes, Jr.
E.G. Noyes, Jr., Presiding Judge

1 CA-SA 94-0214

May 9, 1995

MARICOPA COUNTY
Superior Court
CV 94-00235

A true copy of the foregoing order was mailed
May 9, 1995 to:

Mr. H. Sullivan Bunch
BONNETT, FAIRBOURN, FRIEDMAN,
HIENTON, MINER & FRY, P.C.
Suite 1100
4041 North Central Avenue
Phoenix, AZ 85012-3311
And

Mr. Scott A. Erickson
BONNETT, FAIRBOURN, FRIEDMAN,
HIENTON, MINER & FRY, P.C.
Suite 1100
4041 North Central Avenue
Phoenix, AZ 85012-3311
Attorneys for Petitioners

Mr. Dennis E. Murray, Sr.
MURRAY & MURRAY CO., L.P.A.
111 East Shoreline Drive
PO Box 19
Sandusky, Ohio 44871-0019
And

Mr. David D. Yeagley
MURRAY & MURRAY CO., L.P.A.
111 East Shoreline Drive
PO Box 19
Sandusky, Ohio 44871-0019
Co Counsel for Petitioners

Mr. John T. Moshier
RIDENOUR, SWENSON, CLEERE &
EVANS, P.C.
Suite 900
302 North First Avenue
Phoenix, AZ 85003
Attorneys for Real Party in Interest

Glen D. Clark, Clerk
By
/s/ Leeann Williams
Deputy Clerk

APPENDIX 4

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

February 8, 1995 HON. LOUIS A. ARANETA S. Bailey
Deputy

No. CV 94-00235

PERFORMANCE INDUSTRIES, INC. et al. John E. Moshier

v.

DAVID E. MILLER, et al. Dennis E. Murray, Sr.

David D. Yeagley
Murray & Murray
111 E. Shoreline Dr.
Sandusky, OH 44871

After argument, the Court reviewed the pleadings, the court file and case law in regard to the Motion for Reconsideration filed by Defendants Murray & Murray Company LPA Profit Sharing Plan & Trust and Murray & Murray Company LPA Pension Plan and Trust (Defendants). Based on such review the Court makes the following findings and orders.

1. On June 7, 1994, the earlier trial court Judge Yarnell issued a minute entry ruling denying Defendants' Motion to Dismiss for Lack of Personal Jurisdiction. More specifically Judge Yarnell found that the Ohio General Corporation Statute Section 1701.85 could be applied by an Arizona court to determine "fair cash value" under Ohio law when dissenting shareholders seek to exercise their dissent and appraisal rights as a substantive remedy. Judge Yarnell also held that the Arizona trial court could constitutionally assert specific jurisdiction over Defendants to resolve this action having found consent to jurisdiction by the Defendants.

2. In response to the special action brought by Defendants on August 24, 1994, the Court of Appeals remanded "this case to the trial court for reconsideration of Arizona's exercise of personal jurisdiction over Petitioners in light of the 'minimum contacts' required by Shaffer v. Heitner, 433 U.S. 186 (1977), and Batton v. Tennessee Farmers Mutual Ins. Co., 153 Ariz. 268, 736 P.2d 2 (1987) . . ."

3. Performance Industries, Inc., (Plaintiff) emphasizes that the Court of Appeals did not directly reject Judge Yarnell's finding that "Jurisdiction

over a party can be exercised by virtue of his consent, even if he has no contacts whatsoever with the foreign state. Insurance Corp. of Ireland v. Compagnie des Bauxite's, 456 U.S. 694 (1982), National Equipment Rental v. Szukhent, 375 U.S. 311 (1964) . . ." (See page 4 of Judge Yarnell's minute entry of June 7, 1994.)

4. Major factors intrinsic to this action include:

a. Plaintiff Performance was incorporated in Ohio,

b. Defendants are residents of Ohio,

c. Since May 1993 Plaintiff Performance has had its principal place of business in Maricopa County,

d. Section 1701.85 of the Ohio Revised Code recognizes that a shareholder's dissent and appraisal action may be brought "in the Court of Common Pleas of the county in which the principal office of the corporation which issued such shares is located or was located at the time when the proposal was adopted by the shareholders of the corporation . . .",

e. Plaintiff has no offices, business operations or employees in Ohio,

f. Plaintiff mailed from Maricopa County to Defendants its proxy statement advising Defendants that dissenting from the proposed transaction would subject Defendants to suit in Maricopa County,

g. In November 1993 Defendants voted their proxies in opposition to the proposed transaction and sent them to Plaintiff in Maricopa County,

h. On November 29, 1993, the shareholders of Plaintiff voted in favor of selling Plaintiff's company assets to Walker Manufacturing Company (the Walker transaction),

i. On December 7, 1993, Defendants sent to Plaintiff in Maricopa County their dissenter's demand,

j. On December 10, 1993, Plaintiff demanded that Defendants deliver their stock certificates to Plaintiff in Maricopa County so that the certificates could be endorsed with restrictive legends in accord with Section 1701.85,

k. In December 1993 Plaintiff caused its stock certificates to be delivered to plaintiff in Maricopa County, and

l. On January 6, 1994, Plaintiff filed its Complaint against Defendants in Maricopa County.

5. Defendants have argued that the circumstances of this case do not establish "minimum contacts" for either in rem jurisdiction under Shaffer v. Heitner or "purposeful activities" for minimum contacts under Batton, supra. This Court acknowledges that the circumstances of this case, involving the subsequent relocation of Plaintiff's principal offices to Arizona and the Defendants' exercise of their dissent and appraisal rights by mailing to Plaintiff in Arizona, may not readily fit the decisions in Batton or Shaffer, supra, as readily as other cases.

6. This Court finds that the decisions in Shaffer and Batton do not exclude Judge Yarnell's prior finding and this Court's current finding of consent to jurisdiction. The decision by Judge Yarnell was that Arizona law under Morgan Bank (Delaware) v. Wilson, 164 Ariz. 535, 537, 794 P.2d 959, 961 (App. 1990), when

applied to the circumstances of this case, supports the finding that Arizona may constitutionally assert specific jurisdiction over Defendants to resolve the issue to be litigated: the value of the stock. In Morgan Bank, the Court of Appeals found: "Where a forum selection clause is held enforceable, the necessity for a due process analysis of the type and extent of the Defendant's contacts with the forum . . . is obviated". The Morgan Bank court found that consent is a constitutionally sufficient and dispositive "minimum contact". The "minimum contact" test is satisfied where there is consent. When parties, by agreement, preselect a forum, their selection of the forum is a sufficient minimum contact with that forum as a matter of law. National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 316 (1964). Here, the Ohio statute clearly allowed that a dissent and appraisal action may be brought in the court in which the principal office of the corporation is located. The remedy to Defendants is purely statutory. Armstrong v. Marathon Oil Co., 32 Ohio St. 3d 397, 513 N.E. 2d 776, 781-82 (1987). Without Ohio Statute Section 1701.85, Defendants, as minority shareholders, would have no right of dissent and appraisal. Having elected to exercise

their statutory rights, Defendants are bound to follow the procedures set forth in Section 1701.85. Judge Yarnell found: "The statutory provisions are now and have always been part of the company-shareholder relationship. That relationship is founded in contract and the statutory law of Ohio. It is neither unfair, nor unexpected, that a shareholder may, under such statutory provisions, be hailed [sic] into court in the stated principal business of a corporation." Page 5 of minute entry dated June 7, 1994.

7. The "Catch 22" assertion by Defendants that their exercise of their dissent and appraisal rights unfairly transfers such action to Arizona is nothing more than the application of the Ohio statute which governed the statutory rights and relationships of the parties. Here, the factual nexus among shareholder, corporation and jurisdiction-selecting statute is constitutionally sufficient to support a single action in Arizona. From a constitutional standpoint the burden on a non-resident shareholder is the same in Ohio, where the corporation was formed, or in Arizona where the corporation is located

8. In this case jurisdiction in Arizona is specified by the applicable Ohio statute. The statutory

provision, stating that this action may be brought in the jurisdiction where the office of the Plaintiff corporation is located, is stated as clearly as a contractual forum selection clause would do so. Defendants consented to jurisdiction, even if unknowingly, by exercising their right to dissent under the same statute that recognizes this action in Arizona. The statute's designation of what has become the Arizona forum provides the requisite dispositive contact with Arizona.

THEREFORE, IT IS ORDERED denying the Defendant's Motion to Dismiss for Lack of Personal Jurisdiction.

Upon agreement by both Plaintiff and Defendants, and the Court finding good cause,

IT IS ORDERED that the entry of this ruling and judgment is a final judgment as to jurisdiction and no just reason for delay exists for entry of this ruling as a final judgment.

The signature of the Court shall serve as a formal order pursuant to Rule 58, ARCP.

2-8-95
Date

/s/ Louis A. Araneta
LOUIS A. ARANETA
SUPERIOR COURT JUDGE

APPENDIX 5

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MURRAY & MURRAY COMPANY, L.P.A. PROFIT SHARING PLAN AND TRUST and DENNIS E. MURRAY, SR., its trustee; and MURRAY & MURRAY COMPANY, L.P.A. - DENNIS MURRAY VOLUNTARY ACCOUNT and DENNIS E. MURRAY, SR., its trustee,	) 1 CA-SA 94-0214) DEPARTMENT D) Maricopa County) Superior Court) No. CV 94-00235
Petitioners,	
v.	
SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa, THE HONORABLE MICHAEL YARNELL, a Judge thereof,	
Respondent Judge,	ORDER
PERFORMANCE INDUSTRIES, INC., fka MR. GASKET COMPANY, INC., an Ohio Corporation,	
Real Parties in Interest.	

This special action came on regularly for conference this 24th day of August, 1994, before Presiding Judge Susan A. Ehrlich and Judges Sheldon H.

Weisberg and Sarah D. Grant, and the matter was taken under advisement. After consideration,

IT IS ORDERED that the court of appeals, in the exercise of its discretion, accepts jurisdiction.

IT IS FURTHER ORDERED remanding this case to the trial court for reconsideration of Arizona's exercise of personal jurisdiction over petitioners in light of the "minimum contacts" required by Shaffer v. Heitner, 433 U.S. 186 (1977) and Batton v. Tennessee Farmers Mutual Ins. Co., 153 Ariz. 268, 736 P.2d 2 (1987), and thereafter, such further proceedings as are appropriate.

DATED this 24th day of August, 1994.

/s/ Susan A. Ehrlich
Susan A. Ehrlich
Presiding Judge

1 CA-SA 94-0214

August 24, 1994

MARICOPA COUNTY
Superior Court
CV 94-00235

A true copy of the foregoing order was mailed
August 24, 1994 to:

Mr. H. Sullivan Bunch
BONNETT, FAIRBOURN, FRIEDMAN,
HIENTON, MINER & FRY, P.C.
Suite 1100
4041 North Central Avenue
Phoenix, AZ 85012-3311
And

Mr. Scott A. Erickson
BONNETT, FAIRBOURN, FRIEDMAN,
HIENTON, MINER & FRY, P.C.
Suite 1100
4041 North Central Avenue
Phoenix, AZ 85012-3311
Attorneys for Petitioners

Mr. Dennis E. Murray, Sr.
MURRAY & MURRAY CO., L.P.A.
111 East Shoreline Drive
PO Box 19
Sandusky, Ohio 44871-0019
And

Mr. David D. Yeagley
MURRAY & MURRAY CO., L.P.A.
111 East Shoreline Drive
PO Box 19
Sandusky, Ohio 44871-0019
Co Counsel for Petitioners

Mr. John T. Moshier
RIDENOUR, SWENSON, CLEERE &
EVANS, P.C.
Suite 900
302 North First Avenue
Phoenix, AZ 85003
Attorneys for Real Party in Interest

APPENDIX 6

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

June 7, 1994

THE HONORABLE MICHAEL A. YARNELL

L. Nava, Deputy

No. CV 94-00235

PERFORMANCE INDUSTRIES, INC., fka: MR. GASKET COMPANY, INC., John T. Moshier

v.

ECCO SALES, INC., et. al. Dennis E. Murray, Sr.

This matter involves a statutory appraisal procedure under the law of Ohio of common stock in Performance Industries, Inc. ("Performance") owned by Murray & Murray Company's ("Murray Defendants"). Defendants' Motion to Dismiss for Lack of Personal Jurisdiction has been under advisement.

Defendants contend this court lacks subject matter and personal jurisdiction. Under a literal interpretation of the Ohio General Corporation Law § 1701.85 statutory language, the appraisal proceeding

must be brought in the "court of common pleas of the county...". Defendants argue the use of the uncommon name of Ohio's trial courts, courts of "common pleas", must refer only to an Ohio action. In addition, Defendants argue they have not consented to jurisdiction in Arizona. According to Defendants, regardless of whether viewed as an in rem or in personam action, minimum contacts analysis is required

[sic] -- since Defendants have no contacts with Arizona the court lacks personal jurisdiction.

Plaintiff contends this court possesses subject matter jurisdiction by applying an analogous court doctrine and a constitutional Full Faith and Credit argument to the Ohio General Corporation Law § 1701.85. Plaintiff also contends Defendants consented to jurisdiction by exercising their statutory dissenting shareholder rights. In the alternative, Plaintiff contends this action is in rem (or quasi in-rem) and therefore, a minimum contacts analysis is not required to assert personal jurisdiction.

It is undisputed in this case that Plaintiff is an Ohio corporation with its principal place of business located in Tempe, Arizona. It is undisputed that the stock

was issued to the Defendants while Plaintiff maintained its principal place of business in Ohio, Defendants are resident of Ohio, and other than the stock appraisal process, Defendants have no contact with Arizona.

Subject Matter Jurisdiction Issue

Even if Ohio is attempting to restrict appraisal actions to its courts, this restriction would be invalid. The Restatement provides:

> § 91. Attempted Localization of Action
>
> A state may entertain an action even though the state of the applicable law has provided that action on the particular claim shall not be brought outside its territory.

Restatement (Second) Conflict of Laws § 91 (1971); Tennessee Coal, Iron & Railroad Co. v. George, 233 U.S. 354 (1914) (holding that under the Full faith and Credit Clause a state may not create a statutory right and then restrict its enforcement to its own courts).

In determining which forum court is the proper court to hear a matter regarding foreign law the Restatement states the rule as follows:

> § 123. Proper Court.

> The local law of the forum determines which of its courts, if any, may entertain an action on a claim involving foreign elements.

Restatement (Second) Conflict of Laws § 123 (1971). Arizona law provides that appraisal actions should be brought in Superior courts. Arizona has access to adequate information regarding how to determine "fair cash value" under Ohio statute. Michael G. Schinner, Dissenting Shareholder' Statutory Right to Fair Cash Value: Armstrong v. Marathon Oil Co., Akron L. Rev., 261, (1989). In addition, the Ohio Courts of Common Pleas are equivalent trial courts to the Superior courts in Arizona.

The Ohio General Corporation § 1701.85 states:

> § 1701.85(B) Qualifications and procedures for dissenting shareholders.
>
> .."The shareholder or the corporation . . .[may] file a petition in the court of common pleas of the county in which the principal office of the corporation which issues such shares is located, or was located at the time when the proposal was adopted by the shareholders of the corporation, or, if the same was not required to be submitted to

the shareholders was approved by the directors."

The Plaintiff's principal place of business is located in Arizona, and was located in Arizona at the time when the proposal was adopted by the shareholders.[1] Therefore, this is the appropriate analogous court of competent jurisdiction to hear this matter.

Personal Jurisdiction Issue

No party contends that Defendants have "substantial" or "continuous and systematic" contacts with Arizona. This court does not have general jurisdiction over the Defendants. The issue is whether or not Arizona may constitutionally assert specific jurisdiction over Defendants to resolve the issue in this case: the value of the stock.

Jurisdiction over a party can be exercised by virtue of his consent, even if he has no contacts whatsoever with the forum state. Insurance Corp. of Ireland v. Compagnie des Bauxites, 456 U.S. 694 (1982); National Equipment Rental v. Szukhent, 375 U.S. 311 (1964) (holding that Defendants had consented to the jurisdiction of the New York federal district court by

signing a contract which designated a third person to receive process for them for a suit in New York, should one arise). Here, page 6 of the November 8, 1993 proxy statement advised the Defendant "... the Shareholder or the Company ... may file a complaint in the Superior Court of Maricopa County, Arizona."

Plaintiff points out that Defendants made their written demand on December 7, 1993 for payment of fair cash value of the Shares for which they sought relief in compliance with this same proxy. This demand was mailed to the Plaintiff in Arizona. Plaintiff argues Defendants voluntarily exercised their dissenters rights without opposition to the proxy's forum selection clause and thus implied consent may be inferred from the Defendants' silence.

Defendant contends the demand serves only a notice purpose that the shareholder prefers to sever his connection with the corporation. See Armstrong v. Marathon Oil Co., 513 N.E. 2d 766, 793 (Ohio 1987). Defendant argues that no consent may be implied and a minimum contacts analysis is needed in all cases. Shaffer v. Heitner, 433 U.S. 186 (1977); Bower v.

---

[1] This court does not reach the issue of whether or not the

C.J. Timm Investment Company, 630 A. 2d 678 (Fla. App. 2 Dist. 1994).

Despite the recent hostility to implied consent concepts in the Arizona case law[2], under a statutory stock appraisal scheme such as Ohio's the better reasoned view is to find implied consent by any shareholder exercising appraisal rights under the Ohio statute to be sued in the forum of the Ohio Corporation's then principal place of business.[3] The statutory provisions are now and have always been part of the company-shareholder relationship. That relationship is founded in contract and the statutory law of Ohio. It is nether unfair, nor unexpected, that a shareholder may, under such statutory provisions be hailed [sic] into court in the state of principal business of the corporation.

For instance, the Ohio statute states "[o]their dissenting shareholders, within the period of three months, may join as plaintiffs . . or defendants in any such proceeding, and any two or more such proceedings may be consolidated." If some higher

---

statutory appraisal action might also be brought in Ohio.

[2] See Batton v. Tennessee Farmers Mut. Ins. Co., 153 Ariz. 268, 786 P.3d 2 (1987).

standard of "minimum contact" was constitutionally required for each shareholder, a large potential for multiple actions in different jurisdictions resulting in different appraisal valuations is created. Such a result is unexpected, unfair, and does not serve the legitimate interests of any party or any forum.

Accordingly, IT IS ORDERED denying Defendant's motion to dismiss for lack of personal jurisdiction.

---

[3] This consent may be viewed as either occurring upon stock purchased or upon submitting the demand to utilize the Ohio statutory procedure.

APPENDIX 7

1701.85 Qualifications of and procedures for dissenting shareholders

(A)(1) A shareholder of a domestic corporation is entitled to relief as a dissenting shareholder in respect of the proposals described in sections 1701.74, 1701.76, and 1701.84 of the Revised Code, only in compliance with this section.

(2) If the proposal must be submitted to the shareholders of the corporation involved, the dissenting shareholder shall be a record holder of the shares of the corporation as to which he seeks relief as of the date fixed for the determination of shareholders entitled to notice of a meeting of the shareholders at which the proposal is to be submitted, and such shares shall not have been voted in favor of the proposal. Not later than ten days after the date on which the vote on the proposal was taken at the meeting of the shareholders, the dissenting shareholder shall deliver to the corporation a written demand for payment to him of the fair cash value of the shares as to which he seeks relief, which demand shall state his address, the number and class of such

shares, and the amount claimed by him as the fair cash value of the shares.

(3) The dissenting shareholder entitled to relief under division (C) of section 1701.84 of the Revised Code in the case of a merger pursuant to section 1701.80 of the Revised Code and a dissenting shareholder entitled to relief under division (E) of section 1701.84 of the Revised Code in the case of a merger pursuant to section 1701.801 of the Revised Code shall be a record holder of the shares of the corporation as to which he seeks relief as of the date on which the agreement of merger was adopted by the directors of that corporation. Within twenty days after he has been sent the notice provided in section 1701.80 or 1701.801 of the Revised Code, the dissenting shareholder shall deliver to the corporation a written demand for payment with the same information as that provided for in division (A)(2) of this section.

(4) In the case of a merger or consolidation, a demand served on the constituent corporation involved constitutes service on the surviving or the new entity, whether the demand is served before, on, or after the effective date of the merger or consolidation.

(5) If the corporation sends to the dissenting shareholder, at the addresses specified in his demand, a request for the certificates representing the shares as to which he seeks relief, the dissenting shareholder, within fifteen days from the date of the sending of such request, shall deliver to the corporation the certificates requested so that the corporation may forthwith endorse on them a legend to the effect that demand for the fair cash value of such shares has been made. The corporation promptly shall return such endorsed certificates to the dissenting shareholder. A dissenting shareholder's failure to deliver such certificates terminates his rights as a dissenting shareholder, at the option of the corporation, exercised by written notice sent to the dissenting shareholder within twenty days after the lapse of the fifteen-day period, unless a court for good cause shown otherwise directs. If shares represented by a certificate on which such a legend has been endorsed are transferred, each new certificate issued for them shall bear a similar legend, together with the name of the original dissenting holder of such shares. Upon receiving a demand for payment form a dissenting shareholder who is the record holder of uncertificated securities, the corporation shall make an

appropriate notation of the demand for payment in its shareholder records. If uncertificated shares for which payment has been demanded are to be transferred, any new certificate issued for the shares shall bear the legend required for certified securities as provided in this paragraph. A transferee of the shares so endorsed, or of uncertificated securities where such notation has been made, acquires only such rights in the corporation as the original dissenting holder of such shares had immediately after the service of a demand for payment of the fair cash value of the shares. A request under this paragraph by the corporation is not an admission by the corporation that the shareholder is entitled to relief under this section.

(B) Unless the corporation and the dissenting shareholder have come to an agreement on the fair cash value per share of the shares as to which the dissenting shareholder seeks relief, the dissenting shareholder or the operation, which in case of a merger or consolidation may be the surviving or new entity, within three months after the service of the demand by the dissenting shareholder, may file a complaint in the court of common pleas of the county in which the principal office of the corporation that issued the shares is located or was

located when the proposal was adopted by the shareholders of the corporation, or, if the proposal was not required to be submitted to the shareholders, was approved by the directors. Other dissenting shareholders, within that three-month period, may join as plaintiffs or may be joined as defendants in any such proceeding, and any two or more such proceedings may be consolidated. The complaint shall contain a brief statement of the facts, including the vote and the facts entitling the dissenting shareholder to the relief demanded. No answer to such a complaint is required. Upon the filing of such a complaint, the court, on motion of the petitioner, shall enter an order fixing a date for a hearing on the complaint and requiring that a copy of the complaint and a notice of the filing and of the date for hearing be given to the respondent or defendant in the manner in which summons is required to be served or substituted service is required to be made in other cases. On the day fixed for the hearing on the complaint or any adjournment of it, the court shall determine from the complaint and from such evidence as is submitted by either party whether the dissenting shareholder is entitled to be paid the fair cash value of any shares and, if so, the

number and class of such shares. If the court finds that the dissenting shareholder is so entitled, the court may appoint one or more persons as appraisers to receive evidence and to recommend a decision on the amount of the fair cash value. The appraisers have such power and authority as is specified in the order of their appointment. The court thereupon shall make a finding as to the fair cash value of a share and shall render judgment against the corporation for the payment of it, with interest at such rate and from such date as the court considers equitable. The costs of the proceeding, including reasonable compensation to the appraisers to be fixed by the court, shall be assessed or apportioned as the court considers equitable. The proceeding is a special proceeding and final orders in it may be vacated, modified, or versed on appeal pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code. If; during the pendency of any proceeding instituted under this section, a suit or proceedings is or has been instituted to enjoin or otherwise to prevent the carrying out of the action as to which the shareholder has dissented, the proceeding instituted under this section

shall be stayed until the final determination of the other suit or proceeding. Unless any provision in division (D) of this section is applicable, the fair cash value of the shares that is agreed upon by the parties or fixed under this section shall be paid within thirty days after the date of final determination of such value under this division, the effective date of the amendment to the articles, or their consummation of the other action involved, whichever occurs last. Upon the occurrence of the last such event, payment shall be made immediately to a holder of uncertificated securities entitled to such payment. In the case of holders of shares represented by certificates, payment shall be made only upon and simultaneously with the surrender to the corporation of the certificates representing the shares for which the payment is made.

(C) If the proposal was required to be submitted to the shareholders of the corporation, fair cash value as to those shareholders shall be determined as of the day prior to the day on which the vote by the shareholders was taken and, in the case of a merger pursuant to section 1701.80 or 1701.801 of the Revised Code, fair cash value as to shareholders of a constituent subsidiary corporation shall be determined as of the day before the

adoption of the agreement of merger by the directors of the particular subsidiary corporation. The fair cash value of a share for the purposes of this section is the amount that a willing seller who is under no compulsion to sell would be willing to accept and that a willing buyer who is under no compulsion to purchase would be willing to pay, but in no event shall the fair cash value of a share exceed the amount specified in the demand of the particular shareholder. In computing such fair cash value, any appreciation or depreciation in market value resulting from the proposal submitted to the directors or to the shareholders shall be excluded.

(D)(1) The right and obligation of a dissenting shareholder to receive such fair cash value and to sell such shares as to which he seeks relief, and the right and obligation of the corporation to purchase such shares and to pay the fair cash value of them terminates if any of the following applies:

(a) The dissenting shareholder has not complied with this section, unless the corporation by its directors waives such failure;

(b) The corporation abandons the action involved or is finally enjoined or prevented from carrying it out, or

the shareholders rescind their adoption of the action involved;

(c) The dissenting shareholder withdraws his demand, with the consent of the corporation by its directors;

(d) The corporation and the dissenting shareholder have not come to an agreement as to the fair cash value per share, and neither the shareholder nor the corporation has filed or joined in a complaint under division (B) of this section within the period provided in that division.

(2) For purposes of division (D)(1) of this section, if the merger or consolidation has become effective and the surviving or new entity is not a corporation, action required to be taken by the directors of the corporation shall be taken by the general partners of a surviving or new partnership or the comparable representatives of any another surviving or new entity.

(E) From the time of the dissenting shareholder's giving of the demand until either the termination of the rights and obligations arising from it or the purchase of the shares by the corporation, all other rights accruing from such shares, including voting and

dividend or distribution rights, are suspended. If during the suspension, any divided or distribution is paid in money upon shares of such class or any dividend, distribution, or interest is paid in money upon any securities issued in extinguishment of or in substitution for such shares, an amount equal to the dividend, distribution, or interest which, except for the suspension, would have been payable upon such shares or securities, shall be paid to the holder of record as a credit upon the fair cash value of the shares. If the right to receive fair cash value is terminated other than by the purchase of the shares by the corporation, all rights of the holder shall be restored and all distributions which, except for the suspension, would have been made shall be made to the holder of record of the shares at the time of termination.

(1994 S 74, eff. 7-1-94; 1988 H 708, eff. 4-19-88; 1986 H 428, H 412, H 902; 1984 S 283, H 250; 1974 S 155; 1970 S 158)

APPENDIX 8

Dennis E. Murray, Sr. (#0008783)
MURRAY & MURRAY CO., L.P.A.
Attorneys at Law
300 Central Avenue
Post Office Box 19
Sandusky, Ohio 44871-0019
Telephone: 1-419-627-9700
FAX: 1-419-624-0707

Attorneys for Murray Defendants

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

PERFORMANCE INDUSTRIES, INC., fka MR. GASKET CO., INC., an Ohio corporation, Plaintiff,	)	Case No. CV 94-00235
-vs-	)	
ECCO SALES, INC. DEFINED BENEFIT PLAN and DAVID E. MILLER, its trustee, et al., Defendants.	)	**AFFIDAVIT** of Dennis E. Murray, Sr., in Support of Motion to Dismiss for Want of Personal Jurisdiction

STATE OF OHIO)
) ss.
COUNTY OF ERIE)

Dennis E. Murray, Sr., being first duly sworn, says that:

1. Murray & Murray Co., L.P.A., Profit-Sharing Plan and Trust; Murray & Murray Co., L.P.A., Pension Plan and Trust -- Dennis Murray Voluntary Account; and Dennis E. Murray, Sr., Trustee (Murray defendants), have never conducted any business within, or with any identifiable impact upon, the State of Arizona; have never conducted any business under or pursuant to the privilege of Arizona law; and have never had any assets within the State of Arizona. Murray defendants are located solely within the State of Ohio and have conducted business only within the State of Ohio.

2. The action filed by Performance Industries, Inc., in this Court is a matter which arises out of the issue of ownership interests in an Ohio corporation, Performance Industries, Inc., which has offices in the State of Ohio.

3. Plaintiff, Performance Industries, Inc., is an Ohio corporation. The Murray defendants purchased ownership interest in Performance Industries, Inc., when its only principal place of business was in the State of Ohio.

4. The plaintiff seeks to invoke this Court's jurisdiction over the Murray defendants, in part, pursuant to the Arizona Declaratory Judgments Act. The Murray defendants have taken no action which would subject them to Arizona jurisdiction, especially as it relates to the cause of action for declaratory judgment pursuant to the Arizona Declaratory Judgments Act.

5. The Murray defendants have filed an action in the Common Pleas Court of Cuyahoga County, Ohio, to declare certain shareholder obligations owning from Performance Industries, Inc., to the Murray defendants.

6. Certain individual defendants are necessary parties to the Performance Industries, Inc., action; and at least one of these individuals resides within the State of Ohio.

7. Ohio law governs this transaction.

Further Affiant sayeth not.

/s/ Dennis E. Murray
Dennis E. Murray, Sr.

Sworn to before me and subscribed in my presence this 28th day of January, 1994.

/s/ Winona S. Agsten
Notary Public

CERTIFICATION

This is to certify that a copy of the foregoing Affidavit of Dennis E. Murray, Sr., in Support of Motion to Dismiss for Want of Personal Jurisdiction was served upon all parties in the foregoing cause by sending a copy of same by ordinary mail with postage prepaid on this 28th day of January, 1994, addressed as follows:

John T. Moshier (SBN 007460)
RIDENOUR, SWENSON, CLEERE & EVANS, P.C.
302 North First Avenue -- Suite 900, Phoenix, Arizona 85003 Attorneys for Plaintiff Performance Industries, Inc.

/s/ Dennis E. Murray
Dennis E. Murray, Sr.
(0008783)
MURRAY & MURRAY
Attorneys at Law
300 Central Avenue
Post Office Box 19
Sandusky, Ohio 44871-0019
Telephone: 419-627-9700
FAX: 419-624-0707

Attorneys for Murray Defendants

Supreme Court, U.S.
FILED
JAN 26 1996
CLERK

No. 95-1026

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

MURRAY & MURRAY CO., L.P.A. PROFIT-SHARING PLAN AND TRUST and DENNIS E. MURRAY, SR., its trustee, et al.

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the COUNTY OF MARICOPA;

Respondent,

v.

PERFORMANCE INDUSTRIES, INC., fka MR. GASKET COMPANY, INC., an Ohio corporation,

Respondent-Real Party in Interest.

On Petition for Writ of Certiorari to the Supreme Court of Arizona

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH A. KENDHAMMER*
TIMOTHY H. BARNES
GREGORY P. GILLIS
RIDENOUR, SWENSON, CLEERE & EVANS, P.C.
Two Renaissance Square
40 North Central, Suite 1400
Phoenix, Arizona 85004
(602) 254-9900

Counsel for Respondent-Real Party in Interest
**Counsel of Record*

January 1996

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Whether the Arizona Superior Court of Maricopa County has jurisdiction over Ohio residents in an action filed by an Ohio corporation pursuant to Ohio statutes to appraise the value of stock held by shareholders who dissented from the corporation's sale of assets where the Ohio statutes require that such an action be brought in the county where the corporation has its principal offices and the principal offices of the Ohio corporation are located in Maricopa County, Arizona?

LIST OF PARTIES

"Petitioner" is, collectively: Murray & Murray Co., L.P.A. Profit-Sharing Plan and Trust and Dennis E. Murray, Sr., its trustee; and Murray & Murray Co., L.P.A. - Dennis Murray Voluntary Account and Dennis E. Murray, Sr., its trustee.

"Respondent" is: Superior Court of the State of Arizona, in and for the County of Maricopa; the Honorable Michael Yarnell, a judge thereof. The second special action proceeding also involved as Respondent the Superior Court of the State of Arizona, in and for the County of Maricopa; the Honorable Louis A. Araneta, a judge thereof.

"Respondent-Real Party in Interest" is: Performance Industries Inc., fka Mr. Gasket Company, Inc., an Ohio corporation[1].

---

[1] Pursuant to Rule 29.1, Rules of the Supreme Court of the United States the following entities are subsidiaries or entities in which Performance Industries, Inc. has an ownership interest: Performance Restaurant Group Inc., an Arizona corporation; Performance Funding Corp., an Arizona corporation; Performance Camelback Plaza Development, Inc., an Arizona corporation as managing member of Camelback Plaza Development, L.C., an Arizona limited liability company; Fabricaciones Metalicas Mexicanas, S.A., a foreign corporation; Performance Restaurants of Nevada, Inc., a Nevada corporation; and Western Pacific Airlines, Inc., a Delaware corporation.

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 3

JURISDICTION 3

CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

REASON FOR DENYING THE PETITION FOR CERTIORARI 6

I. THE DECISION BELOW CORRECTLY DETERMINED THAT PETITIONER'S VOLUNTARY EXERCISE OF THEIR DISSENTERS RIGHTS PURSUANT TO OHIO STATUTORY LAW SUBJECTS PETITIONER TO PERSONAL JURISDICTION IN ARIZONA FOR THE LIMITED PURPOSE OF ESTABLISHING THE FAIR CASH VALUE OF THE DISSENTERS SHARES 7

CONCLUSION 22

APPENDIX A A-1

TABLE OF AUTHORITIES

CASES Page(s)

Adam v. Saenger , 303 U.S. 59 (1938).....18

Armstrong v. Aramco Services Co., 155 Ariz. 345, 746 P.2d 917 (App. 1987) 22

Armstrong v. Marathon Oil Co., 32 Ohio St. 3d. 397, 513 N.E.2d 776 (1987).....21

Batton v. Tenn. Farmers Mutual Ins. Co., 153 Ariz. 268, 736 P.2d 2 (1987).....5, 7, 16

Burger King Corp. v. Rudzewicz , 471 U.S. 462 (1985) 9, 17, 19, 20, 22

Chicago Life Ins. Co. v. Cherry , 244 U.S. 25 (1917) 19

Cohen v. Beneficial Industrial Loan Corp , 337 U.S. 541 (1949) 12

Hynson v. Drummond Coal Co. , 601 A. 2d 570 (Del. Ch. 1991) 13, 14

Insurance Corp. of Ireland Ltd. v. Compagnie Des Bauxites De Guinee , 456 U.S. 694 (1982).....18, 19

Keeton v. Hustler Magazine, Inc. , 465 U.S. 473 (1984) 20, 21

Morgan Bank (Delaware) v. Wilson , 164 Ariz. 535, 794 P.2d 959 (App. 1990) 17

TABLE OF AUTHORITIES - Continued

CASES — Page(s)

National Equipment Rental, Ltd. v. Szukhent
375 U.S. 311 (1964) 17, 19

Pink v. A.A.A. Highway Express, Inc
314 U.S. 201 (1941) 13

Shaffer v. Heitner
433 U.S. 186 (1977) 5, 7, 16

STATUTES AND RULES

Fourteenth Amendment 3, 18

28 U.S.C. Section 1257(a) 3

Ohio Rev. Code Section 1701.85 ..... 4, 6, 10, 11, 14, 15, 16

Ohio Rev. Code Section 1701.85(A)(1) 15

8 Del. Code Section 262 11

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-1026

MURRAY & MURRAY CO., L.P.A. PROFIT-SHARING PLAN AND TRUST and DENNIS E. MURRAY, SR., its trustee, et al.

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the COUNTY OF MARICOPA;

Respondent,

v.

PERFORMANCE INDUSTRIES, INC., fka MR. GASKET COMPANY, INC., an Ohio corporation,

Respondent-Real Party in Interest.

On Petition for Writ of Certiorari to the Supreme Court of Arizona

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent-Real Party in Interest, Performance Industries Inc. ("Performance"), an Ohio corporation respectfully requests that this Court deny the Petition for Writ of Certiorari (the "Petition") seeking review of the final decision of the Supreme Court of Arizona denying discretionary review of the Arizona Court of Appeals' decision affirming the Superior Court's denial of Petitioner's Motion to Dismiss for Lack of Personal Jurisdiction.

OPINIONS BELOW

All decisions rendered below by the Arizona state courts are unreported. The decisions are reproduced in the Appendix to the Petition. References to Petitioner's Appendix shall be denoted as ("App. ____"). References to Performance's appendix shall be denoted as ("R. App. ____").

JURISDICTION

On September 26, 1995, the Supreme Court of Arizona denied Petitioner's petition to review the decision of the Arizona Court of Appeals. (App. 1). Petitioner seeks to invoke this Court's jurisdiction pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in relevant part:

> *"nor shall any State deprive any person of life, liberty, or property without due process of law . . . ."*

STATEMENT OF THE CASE

To the extent not controverted or supplemented below, Performance adopts the Statement of the Case set forth in the Petition.

Petitioner will hereafter be referred to collectively as "Murray & Murray".

Murray & Murray is a resident of the State of Ohio. Performance is an Ohio corporation with its principal place of business located in Phoenix, Maricopa County, Arizona. Murray & Murray is one of several shareholders from various states who dissented from an extraordinary corporate transaction of Performance which triggered Ohio statutory dissent and appraisal rights established by Ohio Rev. Code § 1701.85 (the "Ohio Code"). (App. 7). The Ohio Code allows dissenting shareholders to receive the "fair cash value" of their shares as determined by the court. On January 6, 1994, Performance instituted this appraisal action pursuant to the Ohio Code in the Superior Court of Maricopa County, Arizona against all dissenting shareholders, including Murray & Murray. Subsequently, Murray & Murray filed a competing appraisal action in the common pleas court of Cuyahoga County, Ohio. (R. App. A).

Murray & Murray made a special appearance in the Arizona Superior Court appraisal action by filing a Motion to Dismiss for Lack of Personal Jurisdiction. The Ohio appraisal action was stayed pending

a resolution of the issue of jurisdiction of the Maricopa County Superior Court over Murray & Murray. On June 7, 1994, the Maricopa County Superior Court denied Murray & Murray's motion to dismiss, holding that Murray & Murray consented to the Superior Court asserting specific jurisdiction to establish the fair cash value of the stock based upon the Ohio Code requirement that the appraisal action be brought in the county where Performance's principal place of business is located. (App. 6).

Murray & Murray pursued an interlocutory review of the June 7, 1994 decision of the Maricopa County Superior Court. The Arizona Court of Appeals accepted discretionary special action jurisdiction and remanded the case to the Superior Court for reconsideration of Arizona's exercise of personal jurisdiction over Murray & Murray in light of the "minimum contacts" required by Shaffer v. Heitner, 433 U.S. 186 (1987) and Batton v. Tenn. Farmers Mutual Ins. Co., 153 Ariz. 268, 736 P.2d 2 (1997). (App. 5). On remand, the Superior Court analyzed the contacts between Murray & Murray and Arizona and whether or not the minimum contacts analysis was applicable to the court's assertion of jurisdiction under the circumstances of this case. The Maricopa County Superior Court concluded that it could constitutionally assert specific

jurisdiction over Murray & Murray to determine the fair cash value of the stock based upon the forum selection provision of the Ohio Code requiring the appraisal action to be brought in Maricopa County. The court determined that Murray & Murray consented to jurisdiction in Maricopa County by exercising their dissenters rights under the Ohio Code.

Murray & Murray again requested special action jurisdiction by the Arizona Court of Appeals. The Court of Appeals accepted jurisdiction, denied relief to Murray & Murray and adopted the February 8, 1995 opinion of the Maricopa County Superior Court. (App. 3). Murray & Murray's Motion for Reconsideration was denied by the Arizona Court of Appeals. (App. 2).

The Supreme Court of Arizona declined to exercise discretionary review. (App. 1).

REASONS FOR DENYING THE PETITION FOR CERTIORARI

The Arizona courts correctly concluded that the Ohio Code requires that appraisal actions be brought in the principal place of business of the corporation. By exercising the rights granted under the Ohio Code, Murray & Murray consented to the Arizona court's exercise

of specific jurisdiction over Murray & Murray for the limited purpose of determining the fair cash value of the dissenters shares of stock in Performance.

Performance respectfully requests that this Court deny Murray & Murray's Petition for Writ of Certiorari.

I. THE DECISION BELOW CORRECTLY DETERMINED THAT PETITIONER'S VOLUNTARY EXERCISE OF THEIR DISSENTERS RIGHTS PURSUANT TO OHIO STATUTORY LAW SUBJECTS PETITIONER TO PERSONAL JURISDICTION IN ARIZONA FOR THE LIMITED PURPOSE OF ESTABLISHING THE FAIR CASH VALUE OF THE DISSENTERS SHARES

In affirming the trial court's acceptance of jurisdiction, the Arizona Court of Appeals adopted Judge Araneta's conclusion that:

> [T]he factual nexus among shareholder, corporation and jurisdiction-selecting statute is constitutionally sufficient to support a single action in Arizona.

(App. 4-7).

This conclusion was reached despite the acknowledgement of the court that the contacts between the State of Arizona and Murray & Murray don't readily fit the decisions in Batton v. Tenn. FarmersMutual Ins. Co., 153 Ariz. 268, 736 P.2d 2 (1987) or Shaffer v. Heitner, 433

U.S. 186 (1977) based upon the court's conclusion that Shaffer and Batton do not exclude a finding of consent to jurisdiction. (App. 4-5). Analysis of the "factual nexus" to determine whether jurisdiction exists even if traditional "minimum contacts" analysis would not appear to support jurisdiction is common and acceptable especially where some element of consent can be established. This is true even if it is not the "consent" found in a contractual provision establishing the appropriate venue and jurisdiction for litigation between the parties. A sufficient "factual nexus" might be seen as some contacts between the state asserting jurisdiction and the defendant along with some element of consent, usually implied, on the part of the defendant.

Murray & Murray's "factual nexus" with Arizona is sufficient to warrant Arizona's exercise of specific jurisdiction over Murray & Murray for the limited purpose of valuing the shares of stock of Performance. This situation is analogous to a non-resident motorist who has a motor vehicle accident in Arizona. The contacts with Arizona are not sufficient to constitute a substantial connection with Arizona but are sufficient for specific jurisdiction relating to the automobile accident

itself because the motorist has arguably consented to jurisdiction by his actions of driving a car on Arizona highways.

Specific jurisdiction can be based on a single contract or contact with a jurisdiction when the court's jurisdiction is invoked to enforce obligations arising out of that contract or contact. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). In Burger King, this Court recognized the ". . . inescapable fact[s] of modern commercial life" makes jurisdiction over non-residents appropriate even when they have not physically entered the forum. 471 U.S. at 476. If a non-resident defendant purposefully takes an affirmative action establishing obligations between the non-resident and a resident of the forum, the non-resident has established minimum contacts which ensure ". . . that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, . . . or of the "unilateral activity of another party or a third person". Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985).

Through the act of buying shares in an Ohio corporation a shareholder, whether an Ohio resident or not, is granted certain rights created by Ohio statute. The shareholder not only assumes the rights

granted by statute but he also is bound by the requirements imposed by these statutes. By becoming a shareholder, a person "consents" to both the rights and the procedural requirements established by these statutes.

The Ohio Code requires dissenting shareholders to "file a petition in the court of common pleas of the county in which the principal office of the corporation that issues such shares is located . . . ." (App. 7). The Arizona courts have ruled that the Ohio courts of common pleas are equivalent trial courts to the superior courts in Arizona and that the reference to "courts of common pleas" is not a jurisdiction restricting phrase but more a descriptive phase to indicate the general trial court of the state.

When examined in the context of the issue in dispute in an appraisal action, the logic of the Ohio Code and the exercise of limited jurisdiction by the Arizona courts is evident. The sole issue in an appraisal action is the fair cash value of the shares on the date of approval of the corporate transaction to which the shareholder dissents. If the parties are unable to agree on the fair cash value, an appraisal action is filed and the court first decides if the dissenting shareholders have properly dissented. If so, the court appoints an appraiser to value

the stock and make a recommendation to the court regarding the fair cash value of the stock. After receiving the recommendation, the court determines the fair cash value of the stock and renders judgment against the corporation in that amount.

The Ohio Code, unlike Delaware's statutory scheme (8 Del. Code § 262), requires the appraisal action to be brought in the county of the principal place of business of the corporation rather than the state of incorporation. No doubt the Ohio General Assembly envisioned the most appropriate forum for an appraisal action is where the corporate books and records are maintained.

Contrary to Murray & Murray's assertion, the purpose of the Ohio Code is not solely for the benefit of shareholders. An intended benefit of the Ohio Code is judicial economy and the avoidance of a multiplicity of suits against a corporation in every forum in which dissenting shareholders reside. Without such a benefit, publicly traded companies like Performance, are subject to world-wide appraisal litigation. The Ohio General Assembly cannot predict where future shareholders will reside when they dissent. However, it can predict that a corporate party will only have one principal place of business at any

time (regardless of how many times it may relocate during its corporate existence). The travel burden on dissenting shareholders cannot be ameliorated prospectively. But it can be avoided entirely for the corporate party by the very statute the Ohio General Assembly enacted.

This Court has recognized that the incorporating state possesses plenary power to enact legislation governing the manner in which litigation shall proceed between a corporation and its shareholders. Cohen v. Beneficial Industrial Loan Corp, 337 U.S. 541, 549-50 (1949). This Court has also recognized that the shareholder's determination to become a stockholder in a corporation inherently carries with that determination the subjection to the statutes of the incorporating jurisdiction as they relate to the corporation/shareholder relationship. Choosing to become a shareholder includes the imputed consent to the provisions of the governing corporate statutes and the enforcement of the governing statutes involves no denial of due process:

> It is a familiar rule that those who become stockholders in a corporation subject themselves to liability for assessment when made in conformity to the statutes of the state of its organization, although they are not made parties to the proceeding for levying it.

. . .

> Whether we support these legal consequences by reference to consent of the stockholder or to his assumption of a corporate relationship subject to the regulatory power of the State of incorporation, in either case the procedure conforms to accepted principles, involves no want of due process, and is entitled to full faith and credit so far as the necessity and amount of the assessment are concerned.

. . .

> For a necessary consequence of becoming a stockholder is the assumption of those obligations which, by the laws governing the organization and management of the corporation, attach a stock ownership.

Pink v. A.A.A. Highway Express, Inc., 314 U.S. 201, 207-08 (1941) (Citations Omitted).

Thus, the constitutionality of deeming a corporate shareholder to have consented to the provisions of the incorporating states law has long been established.

In Hynson v. Drummond Coal Co., 601 A.2d 570 (Del. Ch. 1991), the court held that the act of purchasing shares of stock in a

Delaware corporation operated to put the shareholder on notice of statutes providing for a single appraisal proceeding in a statutorily designated jurisdiction:

> In my opinion, buying stock of a Delaware corporation (or a New York corporation, etc.) is itself a sufficient act to establish a nexus with the jurisdiction that creates and regulates the internal governance of that corporation to render it consistent with traditional notions of fairness to bind the holder of that stock as a plaintiff to adjudications *concerning the corporate rights that attach to the stock*. . . . But it is not unreasonable–not inconsistent with traditional notions of fairness, in my opinion–to conclude that the law has long put the buyer of corporate rights on notice that corporate rights attaching to stock ownership may be adjudicated in a single proceeding in another jurisdiction, including at a minimum, the corporation's state of incorporation.

Id. at 579, (emphasis added).

Thus, Murray & Murray is deemed to have consented to the provisions of the Ohio Code by voluntarily becoming a shareholder in Performance. The Ohio Code became a necessarily implied term in the shareholder relationship between Murray & Murray and Performance. This nexus was deemed sufficient contact by the Arizona courts to exercise jurisdiction over Murray & Murray.

Murray & Murray again consented to be governed by the Ohio Code by invoking its statutory dissenters rights. The Ohio Rev. Code § 1701.85(A)(1) only grants relief to dissenting shareholders in compliance with the Ohio Code. No one forced Murray & Murray to buy Performance's stock or to exercise its dissenters rights. Whether to dissent or remain a shareholder was solely within Murray & Murray's control. The Arizona courts concluded that it is not unconstitutional to require a party who purposefully and voluntarily chose to avail itself to a statutory remedy to pursue that remedy in the jurisdiction designated by the statute.

Murray & Murray maintains that jurisdiction premised upon the unilateral acts of Performance forces Murray & Murray to defend the appraisal action in whatever distant forum Performance unilaterally chooses to relocate its principal place of business. Contrary to Murray & Murray's inference in footnote 4 of the Petition, Performance did not relocate its principal place of business to impose constitutional hardships on Murray & Murray. It is absurd to believe that one Ohio shareholder could have the power to force a corporation to keep its principal offices in the State of Ohio. Corporations move headquarters. Many publicly

traded corporations happen to have their corporate headquarters located in Arizona. The Ohio Code doesn't prohibit a corporate move, but it does require that any appraisal action be brought in the county of the principal place of business of the corporation.

This hybrid form of statutory consent to jurisdiction may not readily fit the decisions in Batton v. Tenn. Farmers Mutual Ins. Co., 153 Ariz. 268, 736 P.2d 2 (1987) or Shaffer v. Heitner, 433 U.S. 186 (1977). However, if states can create rights relating to statutorily created entities, states can also mandate where litigation regarding those rights must be brought. This logic is proven by the facts of this case. Murray & Murray asserts that Ohio, like Delaware, should require appraisal actions only in the state of incorporation. If it is constitutional for Delaware to require appraisal actions for domestic corporations to be brought in Delaware, is it not also constitutional for Ohio to require an appraisal action to be brought in the county of the principal place of business of an Ohio corporation? In this case, by mere fortuity, the sole remaining dissenting shareholder is an Ohio resident. Consider however if Performance had filed the appraisal action in Ohio naming as a defendant an Arizona dissenting shareholder. Would the Ohio court

have jurisdiction over an Arizona shareholder with no other contacts to Ohio? To avoid these concerns, Ohio pre-selected the forum – the county where the principal place of business of the corporation is located. Therefore, any person acquiring shares in Performance, or any other Ohio corporation, could reasonably expect to be haled into court in the county where the principal place of business of the corporation is located to litigate the share value of the dissenters shares.

When a party consents to jurisdiction the constitutional minimum contacts test is satisfied. "Where a forum selection clause is held enforceable, the necessity for a due process analysis of the type and extent of the defendant's contacts with the forum . . . is obviated". Morgan Bank (Delaware) v. Wilson, 164 Ariz. 535, 537, 794 P.2d 959, 961 (App. 1990), citing Burger King. Simply stated, consent is a constitutionally sufficient and dispositive "minimum contact". Once consent is found, a further weighing and balancing of contacts is not required.

This Court has also held that the due process "minimum contacts" test is satisfied where there is consent. National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 316 (1964). Such consent can

be constructive or implied. "A variety of legal arrangements have been taken to represent express or implied consent to the jurisdiction of the court." Insurance Corp. of Ireland Ltd. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 703 (1982). So long as consent is premised on a defendant's purposeful action, the defendant can be found to have constructively or implicitly consented to jurisdiction even if he does not know that he has done so. In Insurance Corp. of Ireland, this Court discussed personal jurisdiction predicated on implied or constructive consent and specifically found that a defendant may constructively consent to the jurisdiction of a particular court by voluntarily invoking state statutory remedies:

> A variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court. . . . "Parties to a contract may agree in advance to submit to the jurisdiction of a given court." . . . In addition, lower federal courts have found such consent implicit in agreements to arbitrate. . . . Furthermore, the Court has upheld state procedures which find constructive consent to the personal jurisdiction of the state court in the voluntary use of certain state procedures. See Adam v. Saenger, 303 U.S. 59, 67-68, (1938). ("There is nothing in the Fourteenth Amendment to prevent a state from adopting a procedure by which a judgment in personam may be rendered in a cross-action against a plaintiff in its courts. . . . It is the price which the state may exact as a condition of opening its courts to the plaintiff.");

> Chicago Life Ins. Co. v. Cherry, 244 U.S. 25, 29-30 (1917) ("[W]hat acts of the defendant shall be deemed a submission to [a court's] power is a matter upon which states may differ").

Insurance Corp. of Ireland Ltd. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 703-04 (1982) (some citations omitted).

The purposeful action in this case was electing to dissent and demanding payment for their shares. This purposeful election set in motion the machinery which resulted in an Arizona appraisal action. The courts below understood that the factual nexus with Arizona involves jurisdiction selected by the governing Ohio statute. If Murray & Murray had not made the purposeful decision to dissent, there would be no lawsuit in Arizona or elsewhere. However, parties may agree in advance to submit to the jurisdiction of a given court. See, National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 316 (1964). In Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), this Court also enumerated certain considerations which ". . . sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required". 471 U.S. at 477. Thus, in contrast to the burden on the defendant in litigating in the forum state, the trial court should evaluate:

(1) "The forum State's interest in adjudicating the dispute";

(2) "The plaintiff's interest in obtaining convenient and effective relief";

(3) "The interstate judicial system's interest in obtaining the most efficient resolution of controversies"; and

(4) "The shared interest of the several States in furthering fundamental substantive social policies".

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985)

In addition, a year prior to Burger King, the Supreme Court in Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984), focused on two additional considerations which supported Arizona exercising jurisdiction. First, this Court recognized that where, as here, the forum is the plaintiff's residence, the minimum contacts with the forum may be enhanced. 465 U.S. 780. More importantly, this Court considered the ability of a single forum to resolve multiple claims which would otherwise be litigated in several different states to be an important factor supporting jurisdiction. In Keeton, the plaintiff sought to maintain a single action for nationwide libel under the "single publication rule"

which allows all of the plaintiff's claims for libel to be adjudicated in one case. This Court stated:

> New Hampshire also has a substantial interest in cooperating with other States, through the "single publication rule", to provide a forum for efficiently litigating all issues and damage claims arising out of a libel in a unitary proceeding. This rule reduces the potential serious drain of libel cases on judicial resources. It also serves to protect defendants from harassment regarding multiple suits.

465 U.S. at 777.

As in Keeton, multiple, nationwide litigation can be averted by hearing this case in a single forum. It is the public policy of every state to adjudicate all appraisal claims in one unified proceeding. Indeed, the Ohio Supreme Court ". . . concluded that the intent of the [Ohio] General Assembly was that a single determination under R.C. 1701.85 be conducted and not multiple proceedings upon the same issue, with various potential outcomes." Armstrong v. Marathon Oil Co., 32 Ohio St. 3d. 397, 418, 513 N.E.2d 776, 778 (1987).

Murray & Murray made knowing and purposeful contact with an Arizona resident, Performance, by voluntarily exercising its

dissenters rights. Murray & Murray's voluntary election imposed a legal obligation on Performance, an Arizona resident. Murray & Murray had fair warning that electing to dissent may subject it to jurisdiction in Arizona.

> The "fair warning" requirement is satisfied for purposes of asserting specific jurisdiction if the defendant has "purposely directed" its activities at residents of the forum and the litigation results from alleged injuries that arise out of or relate to those activities.

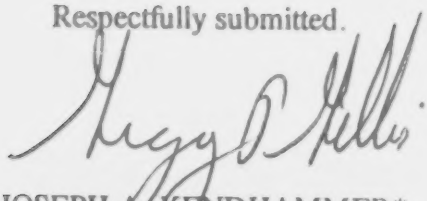
Armstrong v. Aramco Services Co., 155 Ariz. 345, 349, 746 P.2d 917, 921 (App. 1987) (citing Burger King).

The Arizona courts below concluded that exercising their dissenters rights was sufficient contact with Arizona to allow Arizona, the pre-selected forum, to exercise jurisdiction over Murray & Murray for the limited purpose of establishing the fair cash value of the shares owned by Murray & Murray.

CONCLUSION

Respondent-Real Party in Interest, Performance Industries, Inc., respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted.



JOSEPH A. KENDHAMMER*
TIMOTHY H. BARNES
GREGORY P. GILLIS
RIDENOUR, SWENSON, CLEERE & EVANS, P.C.
Two Renaissance Square
40 North Central, Suite 1400
Phoenix, Arizona 85004
(602) 254-9900

Counsel for Respondent-Real Party in Interest
**Counsel of Record*

January 1996

APPENDIX A

IN THE COMMON PLEAS COURT OF
CUYAHOGA COUNTY, OHIO

MURRAY & MURRAY CO., L.P.A., PROFIT-SHARING PLAN & TRUST, by and through its trustees, Post Office Box 19 Sandusky, Ohio 44871-0019 and MURRAY & MURRAY CO., L.P.A., PENSION PLAN & TRUST, by and through its trustees, Post Office Box 19 Sandusky, Ohio 44871-0019	
Plaintiffs,	CASE NO. 264046
-vs-	Judge
PERFORMANCE INDUSTRIES, INC. 2401 North First Avenue Tempe, Arizona 85281	**COMPLAINT SEEKING DECLARATORY JUDGMENT**
Please also serve:	Jury Demand Endorsed Hereon
PERFORMANCE INDUSTRIES, INC. 2401 West First Street Tempe, Arizona 85281	

PERFORMANCE HOLDINGS, INC.
2401 North First Avenue
Tempe, Arizona 85281

JOE HRUDKA
c/o Performance Industries, Inc.
2401 North First Avenue
Tempe, Arizona 85281

TOM HRUDKA
c/o Performance Industries, Inc.
2401 North First Avenue
Tempe, Arizona 85281

and

HOWARD GARDNER
c/o Performance Industries, Inc.
2401 North First Avenue
Tempe, Arizona 85281

Please also serve:

HOWARD GARDNER
4807 Rockside Road - Suite 460
Cleveland, Ohio 44131

Defendants.

Murray & Murray Co, L.P.A., Profit-Sharing Plan & Trust, by and through its trustees, and Murray & Murray Co., L.P.A., Pension Plan & Trust, by and through its trustees (collectively "plaintiffs"), for their Complaint seeking declaratory relief and demanding trial by jury, allege:

I. PARTIES.

1. All well-pleaded allegations contained in the preceding paragraph are repleaded as if fully rewritten herein.

2. Plaintiffs are residents of the State of Ohio. Plaintiffs own, collectively, 461,500 shares of stock of Performance Industries, Inc., and its successor corporation, Performance Holdings, Inc. ("Performance"). Plaintiffs have continuously been shareholders of Performance at all times relevant hereto.

3. Defendant Performance Industries is an Ohio corporation with its executive offices located in Cuyahoga County, Ohio, and Tempe, Arizona. Defendant Performance Industries owns property located in Cuyahoga County, Ohio. Performance Holdings is or is expected to be the name of the restyled Performance Industries

subsequent to a sale of the assets of Performance Industries to Walker, and it is named as a defendant herein.

4. Performance Industries, Inc., and Performance Holdings, Inc., are necessary parties to this action because (a) each may have an interest in or claim arising out of this action and/or (b) the presence of the foregoing (1) may be necessary to accord complete relief among those already parties and/or (2) may be necessary to avoid the impairment of an interest of Performance and/or the risk of subjecting certain parties to double or multiple liability.

5. Defendant Joe Hrudka is chairman of the board, director, and controlling shareholder of Performance. Upon information and belief, defendant Joe Hrudka is a resident of the State of Arizona.

6. Defendant Tom Hrudka is a former director and officer of Performance. Plaintiffs do not yet know the state in which Tom Hrudka resides. Defendant Tom Hrudka is a brother of Joe Hrudka.

7. Defendant Howard Gardner is a former director of Performance. Mr. Gardner resigned his position on May 5, 1993. Upon information and belief, Mr. Gardner is a resident of the State of Ohio.

II. NATURE OF THE ACTION.

8. All well-pleaded allegations contained in the preceding paragraphs are repleaded as if fully rewritten herein.

9. Plaintiffs bring this suit to obtain a declaration of rights as to a prospective course and pattern of obvious self-dealing, personal utilization, and prospective usurpation of opportunities available to the corporation and waste of corporate assets which will be undertaken by defendants Joe Hrudka, Tom Hrudka, and Howard Gardner (collectively "individual defendants"). Individual defendants are certain present and/or former officers, directors and/or controlling shareholders of Performance Industries and its successor, Performance Holdings, who, by reason of such positions, owe and have owed fiduciary duties. The prospective benefits to the individual defendants would constitute a violation of these duties.

10. As a direct and proximate result of the prospective breaches of fiduciary duties alleged herein and the failure of the board to exercise constraint over such breaches, the plaintiffs will lose hundreds of thousands of dollars arising from the sales of certain assets, including the sale to/transaction with Eschlin and the sale of the majority of the

assets of Performance to Walker Manufacturing Company ("Walker"), a subsidiary of Tennessee Gas Pipeline Company.

11. Plaintiffs seek a declaration of rights that the individual defendants, with regard to their prospective wrongful receipt of moneys and other assets which properly belong to the corporate entity, would be in breach of their fiduciary duties.

III. JURISDICTION AND VENUE.

12. All well-pleaded allegations contained in the preceding paragraphs are repleaded as if fully rewritten herein.

13. Jurisdiction of this Court is proper. This action seeks a declaration of rights, pursuant to Ohio R. Civ. P. 57 and R.C. 2721.01, et seq.

14. Venue is proper in this Court for reasons including the following:

a. Upon information and belief, one or more of the defendants resides within Cuyahoga County, Ohio;

b. One of the defendants has his principal place of business within Cuyahoga County, Ohio;

c. One or more of the defendants conducted activity which gives rise to the claim for relief within Cuyahoga County, Ohio;

d. All or part of the claim for relief arose in Cuyahoga County, Ohio; and

e. The stock of the plaintiffs was purchased at the time when the principal place of business of Performance was Cuyahoga County, and these duties which plaintiffs seek to have declared were extant at the time.

IV. FACTS AND ALLEGATIONS.

15. All well-pleaded allegations contained in the preceding paragraphs are repleaded as if fully rewritten herein.

16. By Notice of Annual Meeting of Shareholders and accompanying Proxy Statement, each dated November 8, 1993, Performance, by way of defendant Joe Hrudka and the remaining individual defendants, sought shareholder approval of certain transactions. Certain of the transactions for which shareholder approval was sought will be violative of the fiduciary duties which the individual defendants owe plaintiffs.

17. This action is being maintained to obtain declaratory judgment and relief and to prevent (a) substantive and material breaches of fiduciary duties resulting from transactions subject to shareholder approval and (b) transactions which are not subject to shareholder approval and which may or may not be addressed in the Proxy Statement.

18. To the extent that plaintiffs seek to redress substantive prospective breaches of fiduciary duties resulting from transactions referenced in the Proxy Statement and directly or indirectly made subject to shareholder approval, disclosures concerning such transactions are materially misleading, false, incomplete, and omit or otherwise lack sufficient information on which any shareholder could have made an informed decision. Such inadequate, incomplete, false, misleading, and insufficient disclosures constitute further continuing breaches of the fiduciary duties of the individual defendants, including fiduciary duties of candor and to provide complete information.

19. Plaintiffs seek a declaration that all consulting and noncompetition agreements previously entered into between Eschlin and (1) Joe Hrudka and (2) Howard Gardner ("Eschlin noncompetition

agreements") are invalid, null, and void. As explained in the Proxy Statement, the noncompetition agreements with Eschlin provided for (a) receipt by Joe Hrudka of $200,000 on signing and $1.3 million in equal monthly payments over four years and (b) receipt by Howard Gardner of $200,000 on signing and $600,000 in equal monthly payments over four years. The Eschlin noncompetition agreements are not attached to the Proxy Statement and are not yet otherwise available to plaintiffs.

20. Attached as Exhibits D-1 through D-3 to the November 8, 1993, Proxy Statement (and attached hereto and incorporated herein) are three agreements titled "Consulting and Noncompetition Agreement" ("Walker noncompetition agreements") between Walker and Joe Hrudka, Howard Gardner, and Tom Hrudka, respectively.

21. Upon information and belief, the terms and provisions of the Eschlin noncompetition agreements are substantially similar to those of the Walker noncompetition agreement.

22. All allegations and causes of action alleged herein concerning or involving "noncompetition" agreements shall encompass and include the Eschlin noncompetition agreements (entered into by individual defendants Joe Hrudka and Howard Gardner) and the Walker

noncompetition agreements (entered into by individual defendants Joe Hrudka, Howard Gardner, and Tom Hrudka).

23. The Walker noncompetition agreements, which are similar in all respects (except amount of compensation), provide for, inter alia: a 5-year consulting period of up to 20 days per year (travel included); expenses incurred in consulting activities; confidentiality; and, for a period of 15 years, noncompetition in any business of manufacturing or selling exhaust systems products in North America.

24. The Walker noncompetition agreements provided that individual defendants Howard Gardner and Tom Hrudka will receive $500,000 each and that individual defendant Joe Hrudka will receive $1 million.

25. The Walker noncompetition agreements provide for de minimis consulting services for reasons including the compensation appears to be "front-loaded" (thereby placing Walker at immediate disadvantage in enforcing the terms and provisions of such agreements) and the amount of time that may be devoted is extremely limited, and there is no legal recourse to Walker if death or mental or physical incapacity renders any of the "consultants" unable to perform services.

26. The scope of the noncompetition clause of the agreement is overly narrow and does not correspond to the business of Performance Industries or to the expertise of each individual defendant.

27. The payments made under or pursuant to the noncompetition agreements (Walker and Eschlin) are, in reality and by operation of law -- and this Court's declaration so holding is hereby sought -- part and parcel of and included among the assets of Performance. Individual defendants, by reason of the officerships, directorships, and control over the stock and administration of Performance, propose to divert a portion of the assets of Performance to themselves through the vehicle of noncompetition agreements.

28. In return for the noncompetition agreements, individual defendants discounted the price of the assets of Performance sold to Eschlin and Walker.

29. Any payment made or to be made under either the Walker or the Eschlin noncompetition agreements are properly the assets of Performance.

30. The individual defendants both (1) conducted the negotiations with Eschlin and Walker on behalf of Performance and (2)

imposed, in each event, as a condition precedent of a sale of any asset or a sale of all assets, the payment of sums to the individual defendants as provided for in the noncompetition agreements.

31. Any consulting and/or noncompetition agreement which was a material part of the bargain as insisted upon by Eschlin, Walker or any other purchaser should have been granted in course by each of the individual defendants, as incident to the obligations and duties he owed the corporation.

32. If the knowledge and/or noncompetition of the individual defendants is, indeed, valued at $4.3 million, then such value represents an asset and/or opportunity of the corporation, which the individual defendants propose to usurp, divert, and unlawfully take for their own personal profit and advantage.

33. Because Performance had employment contracts with the individual defendants, such employment contracts should be declared to contain confidentiality requirements, including terms which expressly or by implication make corporate knowledge or expertise an asset of the corporation, not its employees.

34. The individual defendants propose to engage in naked, blatant self-dealing by steering to themselves $2 million in an asset sale (Walker transaction) which Performance projected (in the Proxy Statement) to be worth only approximately $10 million. Thus, the individual defendants' consulting/noncompetition fees would equal approximately 20% of the total purchase price of the assets. It is inconceivable that Walker would pay 20% of the purchase price for nebulous consulting services and a narrow noncompetition clause to three individuals in a capital-intensive industry. Instead, it is clear, given (1) the nature of the noncompetition agreements; (2) the dollar amount proposed to be paid to individual defendants under the noncompetition agreements -- in relation to the total asset sale price; (3) the structure and terms of the noncompetition agreements, including the fact that the noncompetition agreements for the Walker transaction were a condition precedent to the transaction; (4) the deflated value of the price for the assets of Performance; (5) the refusal, failure and/or inability to obtain any outside, independent appraisal to support the price of the asset sale; and (6) the control of the individual defendants over Performance and the asset sale negotiations -- that the consideration for

the noncompetition agreements is actually part and parcel of the price for the purchase of assets of Performance.

35. The foregoing paragraph is realleged as to the specifics, currently unknown by plaintiffs, regarding the $2.3 million received and to be received by individual defendants Joe Hrudka and Howard Gardner related to the Eschlin transaction and related Eschlin noncompetition agreements.

36. Upon information and belief, individual defendant Howard Gardner is licensed as a Certified Public Accountant and does not devote and, for relevant periods heretofore, has not devoted full-time attention or effort to the affairs of Performance, including especially the manufacturing, design, and other non-financial affairs of Performance, and, thus, lacks sufficient expertise and knowledge to justify large payments for consulting services and a noncompetition agreement.

37. Assuming that consulting, confidentiality and/or noncompetition clauses are or could be material or important to effectuate the Eschlin, Walker and/or any other similar transaction, the individual defendants, as present and/or former officers and/or directors of Performance, should have been required to enter into employment,

compensation and/or severance packages in favor of Performance and as part of the terms of any existing employment, compensation, or severance packages. Such clauses should have included a provision allowing for the assignment of such agreement to future parties who might succeed to the interests of Performance. If these terms and conditions are not part of the written agreement between Performance and the individual defendants, this Court should, nevertheless, declare them bound by such restrictions.

38. The absence of employment, compensation and/or severance contracts containing terms necessary and important to protect the interests, business, and assets of Performance gives strong indication that the individual defendants, and Joe Hrudka in particular, prepare to conduct the business and affairs of Performance to benefit and advance the personal interests of the individual defendants, at the expense of the plaintiffs.

39. The individual defendants have been paid salaries and bonuses for the knowledge and expertise possessed by such individual defendants. As such, the knowledge and expertise possessed by the individual defendants, to the extent that it is compensable in the sale of

any or all assets of Performance, is an asset of and owned by Performance; and the asset and any value paid for that asset belong to the corporation.

40. Certain of the terms and provisions of and concerning the Eschlin transaction and the sale of the assets of Performance to Walker constitute a gross and egregious waste of the assets of Performance, including the failure to realize a total of $4.3 million of assets owned by Performance.

41. The foregoing facts and allegations establish that the board of directors of Performance unreasonably, without justification, and without appreciation for the clear self-interests and potential for self-dealing are ceding to the controlling shareholder of Performance and a related group of insiders their authority to negotiate and structure the Eschlin transaction and the Walker asset sale; and such board of directors, which subsequently approved such transactions fraught with self-dealing, personal usurpation of corporate opportunities, and waste of corporate assets, thereby acted without adequate knowledge, without independence, and without disinterest.

V. FIRST CAUSE OF ACTION.

42. All well-pleaded allegations contained in the preceding paragraphs are repleaded as if fully rewritten herein.

43. The individual defendants, by reason of their present and/or past positions as officers, directors and/or controlling shareholders of Performance, owe fiduciary duties to plaintiffs.

44. The fiduciary duties individual defendants owe plaintiffs include fiduciary duties of care and affirmative duties of loyalty. The fiduciary duty of loyalty includes a duty and obligation to refrain from self-dealing and to refrain from the usurpation and taking of opportunities belonging to the corporation. The fiduciary duty of care includes informed, independent, and disinterested decision making. The fiduciary must, at all times and in all instances, do what is best for the corporation.

45. Each individual defendant, by the proposed acts and omissions alleged herein, will breach the fiduciary duties of care and loyalty owed to the plaintiffs. Each individual defendant, by the proposed acts and omissions alleged herein, will breach the fiduciary duties of care, candor, and complete information.

46. The transactions alleged herein to be in violation of the individual defendants' fiduciary duties lack any legitimate business purpose.

47. The individual defendants will breach, by their proposed conduct, their fiduciary duties (a) separately and (b) collectively, pursuant to a common scheme, conspiracy, course of conduct, and through and pursuant to the aiding and abetting of each individual defendant of the breaches committed by the other individual defendants.

48. The individual defendants will engage in self-dealing and failure to exercise reasonable and ordinary care, diligence, independent judgment, and skill in conducting and administering the affairs of Performance in formulating the terms, structure, and sale price of the Eschlin and Walker transactions.

49. The individual defendants bear the burden of proving at trial that the transactions alleged herein involving self-dealing are intrinsically or inherently fair to the plaintiffs.

50. The conduct of the individual defendants constitutes intentional and deceptive behavior indicative of actual malice and/or

aggravated or egregious fraud and further constitutes a conscious disregard of the rights and interests of the plaintiffs that had a great possibility of causing substantial harm.

VI. SECOND CAUSE OF ACTION.

51. All well-pleaded allegations contained in the preceding paragraphs are repleaded as if fully rewritten herein.

52. An issue has arisen as to the appropriate location for the conduct of fair cash value appraisal proceedings. The defendants have taken the position that these proceedings must be held in the State of Arizona. The plaintiffs believe and, therefore, allege that the conduct of these proceedings in Arizona -- as contrasted to Ohio -- violates their right of procedural due process. Accordingly, the plaintiffs ask that this Court declare that the fair cash value proceedings, as contemplated by the Ohio Revised Code, be conducted in Cuyahoga County, Ohio.

VII. THIRD CAUSE OF ACTION.

53. All well-pleaded allegations contained in the preceding paragraphs are repleaded as if fully rewritten herein.

54. Defendant Performance has raised or may raise the issue as to the necessity and timing of placing legends on certificates in

Performance owned by the plaintiffs. The laws of the State of Ohio do not require, under the circumstances extant here, that legends be placed on the certificates of stock in Performance which are owned by the plaintiffs -- for the reason that no certificates were issued prior to the commencement of the fair cash value proceedings. Accordingly, plaintiffs pray for declaratory judgment from this Court that there is no necessity of placing legends on the Performance stock owned by the plaintiffs or, alternatively, that any such legends have or will be declared to have been timely placed on the certificates.

WHEREFORE, plaintiffs pray for the following relief:

A. A declaration of this Court that the individual defendants will be in breach of their fiduciary duties owed to plaintiffs as requested in the First Cause of Action;

B. For the relief requested in the Second Cause of Action;

C. For the relief requested in the Third Cause of Action;

D. For reasonable attorneys' fees and costs of this action, including costs of experts;

E. For an order declaring that all past and prospective proceeds from any buyer of assets of Performance, including the Eschlin

or Walker contract transactions, are the assets of Performance and that the individual defendants are entitled to no amount, direct or indirect, which arises out of such contract transactions;

F. For a full accounting of and for a constructive trust to be placed on all benefits, advantages, profits, and other accretions wrongly acquired or realized by the individual defendants;

G. For pre-judgment interest; and

H. For such other legal and/or equitable relief as this Court deems just and necessary.

Dennis E. Murray, Sr. (#0008783)
David D. Yeagley (#0042433)
MURRAY & MURRAY CO., L.P.A.
Attorneys at Law
300 Central Avenue
Post Office Box 19
Sandusky, Ohio 44871-0019
Telephone: 1-419-627-9700
FAX: 1-419-624-0707
Attorneys for Plaintiffs

JURY DEMAND

Plaintiffs request trial by jury in the foregoing cause of action on all factual issues triable to a jury.

Dennis E. Murray (#0008783)
David D. Yeagley (#0042433)
MURRAY & MURRAY CO., L.P.A.
Attorneys for Plaintiffs

SERVICE BY CERTIFIED MAIL IS REQUESTED UPON THE DEFENDANTS LISTED ON THE FACE OF THIS COMPLAINT.